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BEFORE THE INTEGRATED WASTE MANAGEMENT BOARD
OF THE STATE OF CALIFORNIA

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In the Matter of:) Appeal of Decision by
Wayne Fishback,) Ventura County Hearing
) Officer Affirming Cease and
Appellant,) Desist Order Issued May 11,
) 2006, by Ventura County
vs.) Environmental Health
) Division as the Local
Ventura County Environmental) Enforcement Agency
Health Division, Local)
Enforcement Agency,)
) Public Resources
Respondent.) Code § 45030
_____)

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

TUESDAY, JANUARY 9, 2007

2:08 P.M.

AT THE

CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD

JOE SERNA, JR., CALEPA BUILDING

1001 I STREET

2ND FLOOR

COASTAL HEARING ROOM

SACRAMENTO, CALIFORNIA

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Ms. Rosalie Mul

Mr. Gary Petersen

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Mr. George Eowan

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Mr. Robert Gallagher, County of Ventura

Mr. Robert Mionske

Mr. Darrell Siegrist, County of Ventura

Mr. William C. Stratton, County of Ventura

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1 PROCEEDINGS

2 CHAIRPERSON BROWN: Thank you all for being here.

3 Good afternoon. Happy New Year. Thank you all for being
4 back here.

5 As you know, this is a public hearing of the
6 appeal of the Ventura County hearing officer decision
7 regarding a cease and desist order issued to Mr. Wayne
8 Fishback.

9 I think we need to call roll -- do we not? --
10 first and foremost.

11 So Kristen, if you could call the roll.

12 EXECUTIVE ASSISTANT GARNER: Danzinger?

13 MEMBER DANZINGER: Here.

14 EXECUTIVE ASSISTANT GARNER: Mulé?

15 MEMBER MULÉ: Here.

16 EXECUTIVE ASSISTANT GARNER: Petersen?

17 MEMBER PETERSEN: Here?

18 EXECUTIVE ASSISTANT GARNER: Brown?

19 CHAIRPERSON BROWN: Here.

20 Thank you.

21 Board members and parties have each received a
22 document entitled Schedule of Presentations, which
23 outlines our process for today. Copies have also been
24 placed on the back table. The schedule provides for some
25 limited public comment. If there are any members of the

1 public in the audience today who would like to address and
2 speak, I would like to ask that you fill out a speaker
3 slip, that's provided in the back of the room, and give it
4 to our Board Administrative Assistant, Kristen.

5 At this time, I would like to -- would like
6 everyone that plans on speaking before the Board to rise
7 and be sworn in by the court reporter.

8 (Thereupon the witnesses were sworn, by the
9 court reporter, to tell the truth and
10 nothing but the truth.)

11 CHAIRPERSON BROWN: A couple of housekeeping items
12 before we proceed. First, I want to remind everyone that
13 the Board will consider the appeal solely on the basis of
14 the administrative record before the Ventura County
15 hearing officer.

16 Neither party will be permitted to introduce new
17 evidence in this hearing. Your arguments must speak only
18 to the evidence already in the record and to how
19 applicable law applies to that evidence. The Board's
20 decision will be based solely on evidence in the record
21 and on legal arguments made at the hearing.

22 Second, each of you and the Board members have a
23 copy of this administrative record, with page numberings.
24 When you are making your presentations or referring to the
25 a document in the administrative record, I ask that you

1 indicate that the document and the page number so that the
2 Board members and others will be able to view the document
3 while you are talking about it.

4 And now we will proceed with the appeal.

5 Ms. Neiswender, your presentation is first on the
6 schedule.

7 MS. NEISWENDER: Chairman Brown, again, I would
8 object to the characterization that it was stipulated that
9 nothing new would be presented at this hearing. We spoke,
10 at length, about the fact that we didn't need to do
11 additional briefing and that that was where we were going
12 with this. We do have people speaking today on the law,
13 and if there's any question about whether or not that is
14 considered new evidence, or if there's any issue about
15 that, we need to have an objection on the record.

16 CHAIRPERSON BROWN: Your objection is so heard on
17 the record. But there was an agreement that was made and
18 that was considered at the appeal hearing in December.

19 MS. NEISWENDER: Understood.

20 CHAIRPERSON BROWN: Thank you.

21 MS. NEISWENDER: Mr. Astor will be going first for
22 the appellant.

23 MR. ASTOR: Thank you, Madam Chair, Members.
24 Kelly Astor on behalf of Wayne Fishback.

25 I've given a lot of thought as to how I would like

1 to begin, but suffice it to say that I want to refer to
2 some degree in my remarks to the Board staff report that
3 was prepared incident to this hearing. So I'm going to
4 encourage your panel to have that available to the extent
5 I may refer to it. I do not intend to refer to the record
6 of the hearing at the LEA level.

7 My task today is to provide an introduction to the
8 appellant's case, of the witnesses to follow, and to
9 address certain -- other technical issues. We seek to
10 have the Waste Board overturn the decision of the Ventura
11 County hearing officer, because we deem the LEA's
12 enforcement action, namely the issuance of a cease and
13 desist order, to be inconsistent with the Integrated Waste
14 Management Act.

15 The issue is framed in Page 2 of the staff report
16 that I just referred to. And with your indulgence, I will
17 read from it. "The fundamental question Fishback raises
18 in this appeal is whether the use over a period of years
19 of substantial quantities of dirt, concrete, stucco, and
20 brick obtained from construction sites, for purposes of
21 erosion control, in accord with local ordinances,
22 constitutes the disposal of solid waste for which a permit
23 is required or is an activity required of the regulatory
24 oversight by the LEA pursuant to the IWMA. Staff's
25 statement of the issue, we believe, is correct. Portions

1 of staff's analysis, we believe, are also correct."

2 This conclusion is wrong. Your task is well
3 described in Page 4 of that same report, and again I will
4 refer to it:

5 "Board's task in this hearing is to evaluate the
6 relevant evidence submitted to the hearing officer and to
7 reach a decision that is consistent with and helps carry
8 out the IWMA."

9 Regarding the Act itself -- and I'm one of those
10 that claims to have been around for a while, so we all
11 recall 1989 and what happened at that time. I would
12 concede readily that the overriding purpose of the act is
13 to safeguard public health and safety. That is the chief
14 objective of the act.

15 Secondly, items such as recycling and waste
16 diversion are mentioned as means that are to be encouraged
17 in meeting that objective.

18 Now, the LEA has concluded that the -- that Mr.
19 Fishback was required under applicable law to obtain a
20 registration tier permit. We respectfully disagree. The
21 regulatory framework that is the foundation of the LEA's
22 cease and desist order applies to material that meets the
23 definition of the solid waste.

24 If indeed the material Mr. Fishback were handling
25 were solid waste, then I would submit that the Integrated

1 Waste Management Act has application. And the discussion
2 would then be: What form of permit need he obtain or does
3 he qualify for an exception or exclusion?

4 But my considered opinion is that the material
5 he's handling is not solid waste. He therefore doesn't
6 require a safe harbor and the Board and the LEA lack the
7 ability, in law, to oversee his activities.

8 In any analysis of what is solid waste, one begins
9 necessarily with 4091 of the Resources Code. I will not
10 read that, but I think it is a part of your record.

11 But the analysis doesn't end there. It only
12 begins there. As any lawyer will tell you, to the extent
13 that appellate court rulings are made, which interpret
14 that language and that statute, they have to be given
15 weight and they are part of the analysis of what may
16 constitute solid waste.

17 In this case, we have two court decisions, one of
18 which is mentioned in the staff report. And that is the
19 1994 decision involving waste management of the desert,
20 which we effectually call the Palm Springs case. Two
21 years later, the District Court of Appeal considered a
22 highly similar issue in the City of San Marcos decision.
23 We mentioned both of these, incidentally, in our remarks
24 before the hearing officer several months ago.

25 I don't know a great deal of law. But the one

1 area that I know about is solid waste law and, in
2 particular, these decisions. I regret that I cannot point
3 to an appellate court ruling that says I'm right, because
4 these decisions, like most decisions, were not on all
5 fours with this particular fact circumstance.

6 But the lawyer's job then is to take the case law
7 and the statutes that are out there and apply them to the
8 best of his or her ability to the facts at hand.

9 Those were franchised collection cases. This is
10 not a franchise collection case. But the cases
11 nevertheless are highly relevant and instructive on what
12 solid waste is. One of the things I drew from both of
13 those opinions, and in particular Waste Management of the
14 Desert, was that the court concluded it's futile to try to
15 figure out, with terminology, what solid waste is, because
16 almost anything that we see in our lives is potentially
17 solid waste.

18 So as the court attempted to draw a line between
19 what is solid waste subject to regulation by local
20 jurisdiction, and what is a recycling activity that is
21 beyond the local jurisdiction's ability to regulate, the
22 court saw that describing the definition by material type
23 wasn't going to take it anywhere. That was a circular
24 exercise.

25 It instead employed a bright line test, which

1 said, in essence, if a material's discarded, it's solid
2 waste. If it's not, it's not. And if it's discarded, we
3 know that because there is a fee exchanged for the service
4 of providing collection of the material.

5 Now in this case, we know that Mr. Fishback is not
6 charging anyone for the materials as it comes on his
7 property.

8 One of the things that counsel for the Waste Board
9 sees to pawn in its report is the idea that, well, the
10 homeowner generating the material when his pool was being
11 demolished may have indeed paid somebody to get rid of it.
12 And I concede that may have happened. But in 23 years of
13 looking at solid waste franchises, I know that, typically,
14 title to the material, once it's placed at the curb or is
15 outside the control of the generator, then passes to the
16 person handling it at that point.

17 And in this case, whether it's a demolition
18 contractor or a waste hauler, once they take away this
19 inert material, they are no longer the owner. The new
20 owner is person transporting it. And the owner after that
21 is the place they take it to. Now, no one would argue
22 that if I put a load of aluminum cans out at my curb, and
23 it was hauled away by a contractor, even if he paid for
24 me -- I had to pay him for the service, no one would
25 consider arguing that that solid waste, once it reaches

1 its MRF and ultimately goes overseas or to the next stage
2 in processing.

3 Something highly similar is occurring in this
4 instance. Inert material leaves the construction site and
5 is transported by whomever, ultimately, for disposition at
6 Mr. Fishback's property.

7 The last owner of that material before it reached
8 him was the transporter. That person pays nothing to rid
9 him or herself of that material. Even if one would
10 argue -- and I'm not sure that's true in all cases -- but
11 if one argued that it was solid waste when it left the
12 curb, it lost its character as solid waste at the point
13 Mr. Fishback agreed to take it without charge, unless he
14 was going to take it to a landfill, in which case it's
15 solid waste again. But at the moment that he takes it and
16 applies it to a beneficial use on his property, the very
17 kind of activity that this whole act is designed to
18 encourage, it's not solid waste. May not be a commodity
19 either, but it's a non-waste material. As such, it is not
20 regulateable in the fashion that the LEA seeks to
21 regulate.

22 AB 939, to my knowledge, has one overarching
23 principle that attaches, beyond public health and safety,
24 which I alluded to a moment ago.

25 We do want to encourage reuse and recycling. We

1 do so because we know that landfills are a scarce asset.
2 We know that they aren't always the best of neighbors.
3 And that if we're going to conserve resources and even
4 conserve the resource of unused landfill capacity, we want
5 to do all that we can to see the material is placed
6 elsewhere, subject, always, to the idea that we don't
7 threaten public health and safety in the process.

8 There is no indication, in any of the materials
9 that I've read associated with this case, that there is
10 any real or even alleged public health and safety threat
11 associated with the deposit of these inert materials, on
12 Mr. Fishback's property, as a means of erosion control.

13 Now, others are going to talk about the
14 engineering that was performed. They are going to talk
15 about a lot of stuff, which I think is relevant and would
16 have been even more relevant were we here applying for a
17 notification tier permit or something else. Because at
18 that point, we would have conceded to the notion that this
19 material is solid waste.

20 It is not a fair interpretation. It is no large
21 stretch to take Waste Management of the Desert and the San
22 Marcos decisions and apply them to this situation.

23 Short of going to court and ultimately getting an
24 appellate court to support what I'm saying, I would
25 acknowledge, it's just one man's opinion, but it's a

1 highly informed opinion. And it's no less worthy of your
2 consideration than is the other point of view, which is,
3 we interpret these cases differently. That's what the
4 Waste Board's done, the legal staff to the Waste Board.
5 That's what the LEA did. I think they are wrong.

6 Now I've argued for years before this Waste Board
7 and even its predecessor for the broadest possible form of
8 definition of solid waste. I did so on behalf of the
9 waste industry, because I'm here to protect franchises and
10 our way of doing business. And the irony is not lost on
11 me, that here I am, arguing that this material is not
12 waste.

13 But when Waste Management of the Desert case was
14 heard by the Supreme Court, it drew the line. And since
15 1994 and 1996, with San Marcos, we've all had to abide by
16 and live with that line. It's a bright line test. He's
17 received no compensation, and it's inert material to begin
18 with.

19 If Mr. Fishback were to take this exact kind of
20 material and erect a statue on his property, as artwork,
21 nobody would claim that's solid waste disposal subject to
22 regulation by the Board.

23 In fact, and I'm not a landfill guy, but I've been
24 to a few. I know, at landfills, material that's chiefly
25 inert material, that's culled out of the MSW that's

1 deposited there, and then used for wet weather surfaces,
2 erosion control, that's not counted as diversion -- I
3 mean, as disposal by those regulating those activities.
4 It's diversion.

5 It's not solid waste -- if the same activity was
6 undertaken at a landfill, how then can it be solid waste
7 if it's undertaken on this man's farm. He's building a
8 pasture. The engineering level required of a solid waste
9 landfill does not apply to him. He doesn't need a safe
10 harbor. He doesn't need an exemption.

11 And in conclusion, our argument, with all due
12 sincerity, is that everybody's properly motivated here,
13 but this is an example of someone misreading the
14 regulations because it misunderstood and improperly
15 applied a probable case law.

16 Thank you.

17 MS. NEISWENDER: Speaking of engineering, one of
18 the things that was said in the staff report is that, on
19 Page 12 of that report, "It is unknown whether the work
20 satisfies engineering requirements." And furthermore the
21 staff report indicated at Page 11 that the engineer,
22 Mr. Phil Sherman, began work in the summer of 2006. While
23 an e-mail was circulated to correct that problem and note
24 that Mr. Sherman, in fact, begins work in June of 2005,
25 Mr. Sherman has sent in a letter today that he has asked

1 me to read into the record for him. He was unable to
2 attend today.

3 Mr. Sherman's hearing testimony is at Volume 7,
4 beginning on Page 48 and continuing through Page 74.

5 But these remarks are supplemental to that.

6 Mr. Sherman inspected the site with Mr. Fishback
7 and began work in June of 2005. Quoting from his letter:
8 "We have worked continuously on the project to the present
9 time. The first phase of our work entailed an assessment
10 of the nature of the work that began in early April '05, a
11 determination of any design and permitting that was
12 required, and frequent on-site inspections.

13 "The second phase was to prepare a Hillside
14 Erosion Control Ordinance plan, a HECO plan.
15 Parenthetically, this plan was not required. But due to
16 citizen complaints and the EHD/LEA labeling Fishback's
17 activities a disposal site, we recommended getting an
18 approved HECO plan to establish a paper trail of
19 government sanctioned grading work.

20 "While the LEA and the CIWMB Permitting and
21 Inspection may consider this a disposal site, our own
22 view, based on many other projects, is that that is an
23 engineered construction activity and not an engineered
24 disposal site.

25 "Mr. Fishback's intent is to divert inert material

1 from the landfills, the purpose of which is to stabilize
2 slopes, control run off, and create adjacent usable
3 pasture land.

4 "Regarding the adequacy of engineering, it is our
5 understanding that Howard Levenson, the head of CIWMB
6 Permitting and Inspection Division has advised Fishback's
7 consultants that his engineers have determined the
8 engineering is inadequate. While this is secondhand
9 information, it is consistent with numerous erroneous
10 statements made in the staff report dated 12/6/06. The
11 staff report, in fact, makes many incorrect factual
12 statements.

13 "For example, at Page 11, it alleges Sherman began
14 work in the spring or summer of 2006, and it is not clear
15 that the engineers supervised the work in question.
16 Additionally, staff report alleges there was no evidence
17 the work met the engineering requirements set for
18 engineer-filled activities, inert debris-fill operation,
19 or inert debris type A disposal facility.

20 "First, as mentioned above, Hawks & Associates
21 began work in June of 2005, not in '06. Second, it should
22 be clear, from over 20 pages of testimony by Mr. Sherman
23 at the administrative hearing, that he supervised the work
24 in question. Third, the work performed for Fishback's
25 construction activities far exceed the requirements and

1 work that have been accepted by the EHD/LEA for
2 engineered-filled activities, including the Jefferson
3 project and inert debris engineering fill operation, the
4 Farm Restoration Project. Therefore, even if Fishback's
5 project was a disposal site, the engineering oversight
6 would be more than adequate."

7 He continues to talk about the various projects
8 that he's worked on in the county, including the Jefferson
9 project and the Muranaka Farms, also known as the Farm
10 Restoration Project, and notes that these had far less
11 stringent requirements than the Fishback operation, even
12 though they were more complex.

13 Finally, he adds this: "Fishback was advised by
14 the EHD/LEA that the engineering documents submitted to
15 the LEA were prospective and therefore inadequate. Again,
16 even if Fishback's construction work were under the
17 jurisdiction of the LEA, this characterization of Hawks &
18 Associates design documents for the HECO plan, prepared in
19 the spring of 2006 ignores the inspection work done from
20 the spring of 2005 to the present.

21 "Prior to the HECO plan, all work was performed in
22 accordance with best management practice standards as is
23 published by federal, state, and Ventura County agencies,
24 such as Natural Resource Conservation Services, University
25 of California USDA Extension Service, and the Ventura

1 County Watershed Protection District.

2 "For those not schooled in design and
3 construction, all drawings and specifications, which
4 include referenced design BMPs are, by their nature,
5 prospective. Inspection and final signoffs and
6 certification are done on work in progress or when the
7 work is completed."

8 In addition, Mr. --

9 CHAIRPERSON BROWN: Excuse me, Ms. Neiswender. Is
10 that a letter that you have just read into the record?

11 MS. NEISWENDER: Yes.

12 CHAIRPERSON BROWN: Do you have copies for all of
13 the people at the dais and the Board members?

14 MS. NEISWENDER: No, we do not.

15 CHAIRPERSON BROWN: Can we get copies of the
16 letter, please, for distribution to everybody? Sue, if
17 you want to just grab it, or if somebody could get copies
18 of that at some point. Thank you.

19 MS. NEISWENDER: We also had asked Mr. Brouwer,
20 who is a registered professional engineering geologist to
21 provide additional information on his work on site.

22 Mr. Brouwer was on the site beginning in mid 2003
23 and has continued working through the present time. He
24 has also submitted a letter that we can read into the
25 record but --

1 STAFF COUNSEL BLEDSOE: Madam Chair, just point of
2 order, please.

3 CHAIRPERSON BROWN: Yes.

4 STAFF COUNSEL BLEDSOE: Mr. Brouwer is not a name
5 that I recognize.

6 Was he a person at one of the local hearings for
7 the local hearings officer?

8 MS. NEISWENDER: No, he was not.

9 STAFF COUNSEL BLEDSOE: Then I object that this
10 information is outside the scope of this hearing.

11 MR. KWONG: Madam Chair, as a point of order, I
12 would also like to be on the record as objecting to
13 reading of a letter into evidence.

14 Your clarification, at the beginning of the
15 hearing, was abundantly clear to me, at least --
16 apparently it's not making sense to some people here. But
17 I think that that is an appropriate way to administer this
18 type of a hearing. And reading it into the record is not
19 part of this type of hearing nor is it condoned by the
20 Public Resources Code that governs this type of a hearing.

21 CHAIRPERSON BROWN: Would you like to respond to
22 that before I do?

23 MS. NEISWENDER: The last comment, I think that --
24 I do not have the code section on the tip of my tongue,
25 but there is a Public Resources Code section that says

1 that this Board is to hear all relevant evidence, and we
2 believe that this is relevant evidence.

3 CHAIRPERSON BROWN: But we have agreed to only
4 evidence that is in the administrative record. So I will
5 agree to their objection that you cannot read it into the
6 record. You can get copies and submit them, and we may or
7 may not take that information under consideration during
8 our deliberation.

9 MS. NEISWENDER: Well, then we will submit to you
10 some copies at some point this afternoon so you can take
11 those into consideration.

12 CHAIRPERSON BROWN: Well, if there's other
13 documents that you are going to want copies made, the
14 people just left who are making copies. So when they come
15 back, they can make copies for you. But if there's other
16 things, I would like them copied at the same time.

17 MS. NEISWENDER: It was only these two letters
18 that we were going to be reading into the record. I do
19 not believe that there's anything else.

20 CHAIRPERSON BROWN: We're not going to read the
21 second letter into the record. And we will be happy to
22 take a copy of them. But we are agreed upon, prior to
23 this, that only evidence that's in the administrative
24 record may be considered during this hearing and
25 deliberation.

1 So you can continue with your time.

2 MS. NEISWENDER: Continuing, then, the staff
3 report at Page 8 indicates that -- I will shift now to
4 comments on the staff report -- indicates that Fishback
5 failed to provide information. This is an inaccurate
6 statement of the facts of this case.

7 In the LEA letter to Fishback, dated February 2nd
8 of '06, he talks -- that letter from -- signed by Mr.
9 Stratton asks for the review of any and all available
10 documentation to provide support to comments that only
11 specific types of waste were received, review of available
12 truck monitoring records, discussions with waste haulers,
13 and information from other regulatory agencies.

14 In a letter that was sent back to them, that we
15 discussed in length at the last hearing, we submitted
16 engineering reports, geologic borings, the names of the
17 haulers, the hauling companies, the identification and
18 types of solid waste material, etc. So all of that
19 material is, in fact, in the record.

20 In the staff report, again, at Page 11 --

21 CHAIRPERSON BROWN: Did you make the notations
22 where in the staff report those documents are? Do you
23 have the page numbers and volume for those, just so when
24 we go into deliberation, we can mark them.

25 MS. NEISWENDER: What I would like to do rather

1 than stop right now and locate those exact citations is
2 that at the end of our comments, before you go into
3 deliberations, I will give you the exact numbers on each
4 one of these, if that's acceptable to you, rather than
5 slow things down right now.

6 CHAIRPERSON BROWN: Well, we need them now. And I
7 want them in the record with the notation of where they
8 are, rather than go back and refer to page numbers.

9 So I don't mind taking a couple minutes and not
10 taking it off of your allotted time. If you could just
11 find those page numbers for the engineering documents and
12 let us know what they are, that would be great.

13 MS. NEISWENDER: In Volume 3 of the administrative
14 record, the February 2nd letter is located at the
15 beginning of Page 158. That letter is from the LEA to Mr.
16 Fishback.

17 His reply to that letter is at 161 and following.

18 The March 14th letter, that I just referred to, is
19 at Page 165.

20 And Mr. Fishback's reply is dated 3/17 and begins
21 at 169 and continues through Page 181.

22 In that last document that I just referred to,
23 these are extensive documents of the waste haulers'
24 statements, under penalty of perjury, from the waste
25 haulers as to what they brought in, when they brought it

1 in, tickets, and what we call -- we call them tickets.
2 I'm not sure what they would be called. But it's a little
3 slip that the guy fills out when he comes to the gate, and
4 this is what I'm holding and this is what my name is, and
5 he drops it in a box that we put there for that purpose.

6 Continuing with comments on the staff report, on
7 Page 12 of the report, it indicates, as I mentioned
8 earlier, that it's unknown whether work satisfies
9 engineering requirements. That is why we brought
10 Mr. Sherman to the LEA hearing, what we testified to, as
11 well as the supplemental information that he provided in
12 that letter today.

13 In the staff report at pages -- well, there are
14 several references; Pages 6 and 7, Page 12. It talks
15 repeatedly about type A inert debris. "Materials
16 deposited would likely be considered type A inert debris."
17 Several references, as I mentioned, all talking about
18 inert type A debris. Now, that type of debris is --
19 includes concrete. It includes the type of material
20 that's at the Fishback ranch. But it includes a lot more
21 than that. It includes shingles, glass, fiberglass,
22 materials that were never at the Fishback ranch and that
23 no one ever testified to seeing at the Fishback ranch.

24 In Volume 7 of the administrative record, there is
25 some discussion, starting at Page 12 and continuing

1 through Page 17, that we are in need of soils reports.
2 And to give you a little bit of the background, what
3 happened here was that we -- we went into the hearing
4 saying we needed a little more time because we had not
5 finished doing the soils reports. And that we also wanted
6 to bring in Mr. Astor and Mr. Eowan to testify.

7 At that time, there was a discussion on the record
8 about whether or not the soil borings were necessary. We
9 said, "Of course they are necessary, because the LEA is
10 telling us there's more out there than simply inert
11 debris." And after a lengthy discussion with the hearing
12 officer, the conclusion was that there was no dispute
13 about what was out at the Fishback ranch, and that, in
14 fact, the soil borings were unnecessary.

15 The hearing officer concludes, on Page 17 of
16 Volume 7, you are in agreement as to what the nature of
17 the material is, how it's characterized and how it's --
18 and what it's going to end up being defined as, what's in
19 dispute, and we can continue to proceed on that.

20 With those comments, the soil borings were deemed
21 to be unnecessary, and that's why they were not presented
22 later on.

23 The final comment on the engineer on the staff
24 report, Page 7, "No evidence the material was processed."
25 In fact, there was significant amount of testimony and

1 it's also in the briefing that unwanted material, such as
2 plant material, loose rebar, and asphalt were removed from
3 loads coming in and processed in that fashion.

4 And with that, I would turn this over to Mr. John
5 Conaway.

6 MR. CONAWAY: Good afternoon, Madam Chair and the
7 rest of the Board.

8 I was asking the question about whether my
9 testimony will be allowed because I was not at the
10 official public hearings. I am new to this particular
11 project, and is it appropriate at this point that I ask
12 whether I be allowed to speak?

13 CHAIRPERSON BROWN: Can you state your position --
14 I don't know your relevance.

15 MR. CONAWAY: I'm a professional engineer.

16 STAFF COUNSEL BLEDSOE: Yes. I object Madam
17 Chair.

18 CHAIRPERSON BROWN: There is an objection to you
19 being here.

20 MR. KWONG: On behalf of the County LEA, I would
21 also like to register my objection the Mr. Conaway's
22 testimony slash opinion.

23 CHAIRPERSON BROWN: Unless of course he's
24 testifying to information in the hearing record.

25 MR. KWONG: Only in the record, yes.

1 CHAIRPERSON BROWN: So if you are testifying to
2 information that is contained in the record, then you may
3 proceed.

4 Would you like to respond, or is there some
5 clarification?

6 MS. NEISWENDER: Yes, clarification only.

7 Mr. Conaway is testifying on -- in his inspection
8 of the record and the record only. It is the same as
9 Mr. Astor's testimony and Mr. Eowan's testimony, that they
10 were commenting on the facts of this case as have been
11 established through the administrative record.

12 MR. ASTOR: Madam Chair, may I be heard on this
13 for just a moment? I beg your indulgence. The lawyer in
14 me compels that I weigh in on this.

15 CHAIRPERSON BROWN: I'm sorry. I'm not surprised.

16 MR. ASTOR: There are very few surprises left when
17 it comes to me, Madam chair.

18 I guess what I would like to see happen here,
19 there's a disagreement as to what the agreement was
20 relative to the administrative record and to what extent
21 we're limited by that.

22 Just drawing analogy to when I used to go into
23 court rooms, if we are going to err on the side of
24 caution, here, maybe the witness, who's gone to the
25 trouble of being here, is allowed to testify, and then the

1 Board can decide, on its own, what weight, if at all, it
2 gives to that, rather than foreclosing it because Ventura
3 County counsel may have a problem with it. They object;
4 we don't. Let's hear it, and you can decide whether you
5 want to consider it or not.

6 Thank you.

7 CHAIRPERSON BROWN: My opinion has nothing to do
8 with what you just said, but this is the case. I think we
9 should allow him. Since he's been here, he would like to
10 testify to the record. And we'll deem whether it's
11 appropriate and within the guidelines of what our
12 stipulated agreement was ahead of time.

13 So you will proceed.

14 MR. CONAWAY: Thank you, Madam Chair. Because I
15 have not had the pleasure of meeting any of you before, I
16 need to go through and kind of explain who I am and what
17 my background is. I do see a couple familiar faces here
18 from the old days. And it's nice. I didn't think I would
19 see a soul here that I -- that I knew. But I am John
20 Conaway. I'm a registered professional engineer in the
21 state of California. I have been one for 38 years. Most
22 of my years of experiences have been a solid waste
23 engineer. In fact, I was an engineer in solid waste
24 before there was solid waste to be engineered.

25 Case in point is that this Board was not formed

1 when I started working in the industry. And when the
2 initial -- not Integrated Waste Management Board, but the
3 Waste Management Board was formed, I was involved with the
4 development of the regulations and part of the advisory
5 committee that was the backbone of where we sit here
6 today. So I have had a great deal of experience in this
7 field.

8 I had practiced in the County of Sonoma. I was
9 their solid waste director and chief engineer for a couple
10 hundred years, I guess. That was a long time ago. And
11 there I left and was chief engineer for several small
12 counties in solid waste. I left the state for a brief
13 period and came back, and have been for the last,
14 basically 13 years, the director and chief engineer for
15 the Ventura Regional Sanitation District. I have
16 engineered and operated many landfills.

17 With that in my background, I was brought into the
18 project to evaluate the Fishback operation and to offer my
19 opinion here today. I have reviewed the geologist --
20 coastal geology and the project engineers, Hawks &
21 Associates, which are both very reputable firms, and
22 reviewed their plans and reports and most recent
23 submittals, which I think we've had an item of discussion
24 here. And I have a business. I have conducted my own
25 investigation. And in my opinion, the construction is

1 being done following best management practices and
2 activities and protocols. The operation is safe, the
3 plans and engineering analysis show and demonstrate that
4 the slope stability, erosion control, drainage control,
5 and quite candidly, it meets the minimum operating
6 standards of Title 27 for landfill operations and
7 handling.

8 Now, that only has to be -- I guess it's only
9 pertinent if this is the solid waste facility or however
10 that is determined here. But in a nutshell, it has -- it
11 has engineering and it is being operated in a reasonable
12 fashion.

13 Thank you.

14 CHAIRPERSON BROWN: Thank you very much.

15 Ms. Neiswender, you have about 20 minutes
16 remaining, 25 maybe.

17 MS. NEISWENDER: Thank you, Madam Chair. Mr.
18 Fishback has a short slide presentation.

19 MR. FISHBACK: May have to take a moment here to
20 see how this works.

21 (Thereupon an overhead presentation was
22 presented as follows.)

23 MR. FISHBACK: Even though I'm paying the bills,
24 I've been told to keep this short. So I'm going -- I
25 understand that you see something on the screen that we're

1 seeing up there.

2 I just wanted to share with you a little bit in
3 terms of the property, of what I'm trying to achieve as an
4 owner, and also point out, certainly, what the last thing
5 in the world I would ever want to be perceived or
6 connected with my property, and that is a dump site.

7 I think my property is one of the most spectacular
8 pieces of property in Southern California, if not the
9 state. And naturally, I'm biased. But I think, as I go
10 through a few of the slides, you may agree with me.

11 This is a shot, obviously -- well maybe not
12 obviously, but it's taken from a helicopter. And it's
13 looking pretty much straight down on the property. And I
14 guess I don't have a pointer, but you will notice kind of
15 a large V-shape area, to the right of the screen, that
16 goes down toward the bottom. That is one of the sites
17 that is at issue in terms of one of the fill sites. And
18 each one of the three cases, where concrete was used,
19 there were very, very steep ravines where we had road
20 washout and a lot of potential for erosion and landslides,
21 what have you.

22 So virtually all the concrete that was used was
23 used for slope stabilization.

24 --o0o--

25 MR. FISHBACK: This is the property to the

1 southwest. And here again, if you look kind of toward the
2 upper left-hand side, you will see a road coming in 90
3 degrees from another main road. Then it winds itself
4 down. And there is approximately a 200-foot drop within
5 about 300 feet, which makes it something like a 1.33 to 1
6 slope, which in and of itself. But that angle is --
7 becomes unstable. And the road that was built that
8 bridges across, as you see the mountain going on up, above
9 the road there, that basically -- that road didn't used to
10 be there.

11 And so there was quite a lot of damage down
12 through that ravine. And so that was the other fill site.
13 So there were two fill sites that we were dealing with
14 after the '05 storms.

15 --o0o--

16 MR. FISHBACK: This is a fill site that was done
17 back in 2003. And it was before the regulations. And we
18 don't even view that as particularly at issue here,
19 although it was reviewed by the LEA.

20 --o0o--

21 MR. FISHBACK: This shows some closer up shots.
22 This was the site No. 2, we identified it as. Actually,
23 at this stage we were bringing in primarily topsoil and
24 covering up the concrete for planting.

25 --o0o--

1 MR. FISHBACK: And this shows that steep ravine
2 that you see going on right on down to the left-hand lower
3 part of the screen, and then it just keeps going up, kind
4 of behind the plantings and hillside, there, in the
5 foreground.

6 --o0o--

7 MR. FISHBACK: The site, if you look, you won't
8 quite recognize it. But that's the property in the
9 background. And we're right above an old famous movie
10 site, where the "Lone Ranger," Gene Autry, and all those
11 old famous "Gun Smoke" westerns were made. So it is a
12 fabulous property, and the geology is just remarkable.

13 --o0o--

14 MR. FISHBACK: These are some of the views off of
15 the property. And most of the property runs along the
16 ridgeline. These are some Arabian horses that we have.
17 And that's really the intent, just to make this a horse
18 and cattle ranch.

19 --o0o--

20 MR. FISHBACK: This is a drawing that indicates
21 the -- basically the dark brown is after the erosion
22 occurred along the -- that steep ravine. The dotted line
23 is what it was before. And then the light orange is what
24 we intend to place in there as fill.

25 --o0o--

1 MR. FISHBACK: Now, when we looked at the grading
2 plans and what have you --

3 --o0o--

4 MR. FISHBACK: -- we looked at three alternatives.
5 One would be a typical approach of putting in compacted
6 earth. And that is quite expensive in terms of the amount
7 of compaction, water treatment, what have you, to do that.
8 But we would plant that. And that's kind of an artist's
9 rendering of what it would look like, looking up through
10 that hillside.

11 STAFF COUNSEL BLEDSOE: Madam Chair, if I may
12 interrupt for just a moment.

13 This has gone on really longer than I think is
14 appropriate. I do object. This is not evidence that was
15 in the administrative record. None of this material was
16 before the hearing officer. The hearing officer saw none
17 of these beautiful slides. I respectfully request that
18 you terminate this presentation.

19 MR. KWONG: I would also like to join in that
20 objection, Madam Chair.

21 MR. FISHBACK: We'll go with that.

22 MS. NEISWENDER: Basically, Mr. Fishback's
23 presentation is complete. Mr. Eowan will close for us.
24 Thank you.

25 MR. EOWAN: Can we bring that up, please?

1 CHAIRPERSON BROWN: Are you bringing up a new
2 presentation or the same one?

3 MR. EOWAN: Yeah, I'm bringing up mine.

4 CHAIRPERSON BROWN: Sue, there's a -- do you have
5 Mr. Eowan's presentation?

6 STAFF COUNSEL BLEDSOE: Madam Chair, excuse the
7 interruption, please. But once again, before we see these
8 slides, we know for a fact, unless he's showing three
9 particular slides that are in the record, this is material
10 that was not before the hearing officer and is not
11 appropriate for you to consider today. So I would object
12 on that ground.

13 MR. KWONG: Also join in that objection. Again,
14 going back to your earlier statement; if he's only going
15 to opine on what is already in the record and give his
16 opinion, I don't have a problem with him stating an
17 opinion. But again, these slides have not been shown to
18 the County or to your staff about what it was going to be.
19 He was here in December. He had it cued up for
20 presentation. Not once did they come to us and say, "This
21 is what we plan to show. I want to get your feedback on
22 it."

23 That is what is normally done in a court of law,
24 when I was walking into courtrooms as well. And we still
25 do that today, and we show the other side what the

1 evidence is before we do that.

2 CHAIRPERSON BROWN: Mr. Eowan, can you proceed
3 without a slide presentation?

4 MR. EOWAN: I will do whatever you direct me to
5 do. I'd be happy to do it either way.

6 CHAIRPERSON BROWN: Okay. Without the
7 presentation, please.

8 MR. EOWAN: Okay. You've heard -- thank you for
9 the opportunity, here, to just talk briefly about --

10 CHAIRPERSON BROWN: You have to state your name
11 for the court reporter.

12 MR. EOWAN: George Eowan representing Mr.
13 Fishback.

14 CHAIRPERSON BROWN: Thank you.

15 MR. EOWAN: You've heard legal arguments. You've
16 heard some engineering arguments. You've heard Mr.
17 Fishback, a bit, talk about his vision for this place.
18 And I want to bring us all back, you know, with kind of a
19 bigger or maybe a broader scope of what we are talking
20 about here. The reason we're appealing this -- and with
21 all due respect to the attorneys here, we're -- we're
22 deliberating on this not to redo what we've already done
23 at the local level. The reason you are here and to listen
24 to us is because you have an expertise and a
25 responsibility on a broader level.

1 And for that reason, I would like to ask you to
2 look at this discussion from the standpoint of what
3 broader policy questions are involved in this,
4 particularly as it pertains to the definition of solid
5 waste, as Mr. Astor mentioned.

6 If you look at 40191, statute that defines solid
7 waste, it says, and I'm going to read it, even though
8 Kelly didn't, since I don't have the ability to use the
9 slide that was going to put this up there: "Except as
10 provided in Subdivision B, solid waste means all
11 putrescible and non-putrescible solid, semisolid, and
12 liquid waste including garbage, trash, refuse, paper,
13 rubbish, ashes, and industrial waste demolition and
14 construction waste."

15 So if you read that circumspectly, if you put
16 boundaries around that definition, you end up with the
17 decision that everything is solid waste. You are sitting
18 on solid waste. You are looking at solid waste. And
19 that's an unreasonable way to go.

20 It is only solid waste when it's disposed. That's
21 what the court cases say, that Kelly referenced.

22 If it's not -- if this piece of paper is disposed,
23 it's solid waste. But reasonably, if it's sitting on this
24 desk and being used, it's not solid waste. And our
25 contention is that the same holds true for what Mr.

1 Fishback is doing on his property. Just because C&D is
2 listed in the definition of solid waste doesn't mean that
3 when he uses it for slope stabilization that it's solid
4 waste and therefore a landfill.

5 So you have to get clear, on the land -- on the
6 solid waste definition and say that this material is solid
7 waste; now we need to look at it through the engineering
8 regulations in the Public Resources Code.

9 But if you say, no, it's not solid waste because
10 it's being used for productive purpose, in this case
11 construction, then it's not disposal and therefore doesn't
12 fall under the rules of the LEA.

13 Now, the LEA has a responsibility to regulate
14 landfill and solid waste activities. And he's looking at
15 it through the lens of disposal. But there are other ways
16 to look at this. And that's what we hope that you will
17 look at from the standpoint of a greater policy issue. I
18 don't think you want to say people can't use this kind of
19 material for slope stabilization.

20 Now you may say, we want to make sure it's done
21 well, that it protects the public health and safety and
22 the environment. That's right; we don't have an issue
23 with that.

24 But to say that every time someone uses
25 construction demolition waste, particularly inerts,

1 concrete, so forth, that he's using, and to say that
2 that's always disposal because we have regulations that
3 say, this is what a C&D disposal site looks like, the two
4 don't mesh every time.

5 So you have to look at what the intended use of
6 the material is. He's clearly not -- doesn't want to be,
7 never intended to be, hopes never to be -- a solid waste
8 landfill.

9 Is that to say that he did everything perfectly
10 right? Well, that's for you to decide. Maybe not.

11 But his intention was to improve his property so
12 that he won't have anymore washouts, and so that he can
13 continue to, you know, accomplish the vision that he has
14 for himself and his family on that property. That's
15 really it's all about.

16 And we're asking that you consider it in that
17 light and direct the staff to interpret things on a
18 case-by-case basis. And in this case, that is the
19 intention of this activity.

20 If you need to direct local agencies, the Public
21 Works Department, the Resource Conservation District,
22 other -- other local agencies that he's worked with, and
23 sit down with all of us and make sure that we're doing it
24 properly so that public health and safety is protected and
25 the environment is protected, that's absolutely fine.

1 But I think, as we all know, the Waste Board has a
2 zero waste -- I don't want to -- forgive me, but you do
3 have a zero waste thing. We all believe in that. And C&D
4 is a critical part of that. And this is an innovative use
5 of that material. And I'm sure that you're looking for as
6 many innovative uses as possible, and that's what he's
7 trying to do. That's all we are saying. It's as simple
8 as that. I really don't need slides to show you that.

9 But we just ask respectfully that you uphold our
10 intention to continue to do that and rescind the cease and
11 desist.

12 Thank you very much.

13 CHAIRPERSON BROWN: Thank you.

14 Do you have one last comment?

15 MS. NEISWENDER: Madam Chair, we've managed to
16 finish this in 50 minutes rather than 55. We would
17 respectfully ask that those extra five minutes be put into
18 our rebuttal time in case we need it there.

19 CHAIRPERSON BROWN: Next, we will move to the LEA
20 presentation, Mr. Kwong.

21 MR. KWONG: Good afternoon, Madam Chair Brown and
22 Members of the California Integrated Waste Management
23 Board.

24 My name is Robert Kwong. I'm an assistant county
25 counsel representing the Ventura County Regional Resource

1 Management Agency and Environmental Health Division. On
2 behalf of the Environmental Health Division, who is the
3 local enforcement agency in this manner, I would like to
4 thank you and your fine staff for the professional and
5 evenhanded manner in which this matter has been handled to
6 date.

7 The County's presentation will be comprised of two
8 speakers. As the County's legal presentive presented, I
9 will speak on legal issues presented in this case and on
10 the arguments that you have just heard; and William
11 Stratton, to my right, the technical services manager of
12 the County's Environmental Health Division, will speak
13 about the critical role that the LEAs play in the
14 enforcement of State solid waste laws and regulations.

15 And with that introduction I would like to give
16 this time over to Mr. Stratton.

17 MR. STRATTON: Thank you, Mr. Kwong.

18 Madam Chair Brown and Board members, the County of
19 Ventura Environmental Health Division is designated by all
20 the cities in Ventura County as well as the County Board
21 of Supervisors as the local enforcement agency.

22 As the LEA, we have a statutory responsibility to
23 enforce state law and regulations concerning activities,
24 operations, and facilities that handle, process, store,
25 and dispose solid waste. And we take this responsibility

1 very serious.

2 Before you is an approximately 1200-page
3 administrative record that sets forth the facts and
4 arguments that we believe clearly support the enforcement
5 action taken by the LEA.

6 I'm not going to reiterate our arguments in that
7 document today. I believe the record is very clear.
8 Moreover, in the Board staff report, dated November 29th,
9 2006, on Page 14, Section B, prepared by Michael Bledsoe
10 of your legal department, staff comments that, and I
11 quote, "For the most part, and in every respect material
12 to this appeal, staff concurs with arguments made by the
13 LEA. Hence, calling out those arguments would be
14 redundant and is not necessary. Suffice it to say that
15 based on the LEA's pleadings submitted to the hearing
16 officer, Board staff and the LEA are in agreement," closed
17 quote.

18 The merits of the case before you today are very
19 simple and straightforward.

20 Based on the results of our investigation
21 concerning the activities on Mr. Fishback's properties, we
22 determined that, one, CDI material was received at the
23 Fishback properties as solid waste; two, Mr. Fishback is
24 allowing the disposal of solid waste on his properties;
25 and three, a solid waste facilities permit is required.

1 I want to point out that we arrived at our
2 determination based in part on consultation with your
3 Board staff throughout this enforcement process. And, in
4 fact, in February 2006, two Board staff accompanied the
5 LEA staff during an on-site inspection of the disposal
6 activities at the Fishback properties.

7 Once the LEA made these determinations, we had a
8 statutory responsibility, as required by the PRC, to
9 immediately issue a cease and desist order, if the LEA
10 determines that an operation activity or facility is
11 required to have a permit and is, in fact, operating
12 without a solid waste facility permit. And this is
13 precisely the enforcement action initiated by the LEA in
14 this case.

15 Mr. Fishback appealed this enforcement action, and
16 the hearing officer, at the conclusion of the
17 administrative hearing, determined that, one, the CDI
18 going to Mr. Fishback's property is, by definition, solid
19 waste; two, Mr. Fishback is disposing of the solid waste
20 on his property; and three, this activity is required to
21 have a permit from the LEA.

22 The hearing officer report is found in the
23 administrative record, Document No. 6, Pages 21 to 23.

24 Based on these determinations, the hearing officer
25 decision was to uphold the issuance of the cease and

1 desist order by the LEA.

2 Mr. Fishback then appealed this decision to your
3 Board. In the staff report dated November 29, 2006,
4 Mr. Bledsoe -- on Page 26 -- Mr. Bledsoe concludes that
5 for the reasons stated in the report, and I want to quote,
6 "And on the basis of the evidence and arguments submitted
7 to the Board, staff recommends that the Board uphold and
8 affirm the decision of the hearing officer," end quote.

9 Your Board's decision concerning this appeal and,
10 more importantly, the applicability of Title 14, Article
11 5.95, to CDI activities and operations and facilities, may
12 well have significant statewide implications concerning
13 implementation and enforcement of your Board's solid waste
14 regulations.

15 We support the Waste Board staff recommendation
16 and we request that your Board follow the Board staff
17 recommendation to uphold the hearing officer decision.

18 I'm available to answer any questions you might
19 have.

20 And at this time I would like to turn this back
21 over to Mr. Kwong. Thank you.

22 MR. KWONG: Thank you.

23 I would like to begin my legal argument by just
24 saying that we need to, I think, step back one bit -- just
25 as Mr. Eowan said on this item, and I agree with him --

1 and take a little bit of a bigger picture of this case
2 here, and to understand some of the themes that run
3 through the appellant's argument here. The appellant's
4 entire case is based upon the concept of denial.
5 Appellant denies the truth about what took place in this
6 case. Or to put it another way, appellant denies that
7 which accurately describes reality.

8 The reality in this case is that Mr. Fishback
9 disposed of solid waste on his property without first
10 obtaining the necessary permits from the local enforcement
11 agency or even attempting to meet the minimum requirements
12 that is necessary to take the actions that he did on his
13 property, that you saw on those slides.

14 Clearing aside the bulk of appellant's 55-minute
15 presentation or 50-minute presentation, we understand that
16 there's an attempt to complicate a very simple matter.
17 And the theme that we would like to set before you is,
18 this is a very simple case. And this is a simple case of
19 three questions:

20 First, is there substantial evidence, in the
21 administrative record before you, showing that the Ventura
22 County hearing officer's September 22nd, 2006, decision,
23 to uphold the May 11th, 2006, LEA's cease and desist order
24 is correct or consistent with the Integrated Waste
25 Management Act? That's the first question;

1 Second question: Is the CDI, deposited on
2 Fishback's property, solid waste as defined by the
3 Integrated Waste Management Act;

4 And the third question is: Does Fishback's
5 actions regarding the CDI on his property constitute
6 disposal, or does it meet the requirements of solid waste
7 processing, recycling, transferring, or diversion?

8 Let me answer the first question: Yes, there is
9 substantial evidence in this record indicating that the
10 actions that took place, not only by the LEA cease and
11 desist order, but the hearing officer's upholding of that
12 decision is to advance the cause of the Integrated Waste
13 Management Act. It is here to protect the health and
14 safety of all individuals living in Ventura County who
15 might be subject to activities that might endanger the
16 land as well as houses below or above where this activity
17 took place.

18 Second question: Is it solid waste? There is a
19 precept in law that you read the statutes with a plain
20 meaning, with the plain language that is there. We don't
21 interpret if there's plain meaning in the language. We
22 don't go outside and seek intentions or the fact that I
23 may have been involved in the writing of that law or the
24 lobbying of that law or possibly even advocating that the
25 law say a certain thing. Those things are not proper in

1 reading the law when plain meaning is clear.

2 And the plain meaning of 40 -- of the sections in
3 the Public Resources Code that define solid waste are
4 clear on their face. So the answer to that question is
5 yes.

6 Third question: Were these activities disposal?
7 Answer, yes. There is not any solid waste processing
8 going on with regards to the materials that he brought on
9 site. There is no evidence that he is recycling this
10 material. There is no evidence that he is transferring
11 this material to another site or diverting it for purposes
12 as set forth under the statute and the regulations.

13 So all of the questions are simply answered by the
14 evidence that is already in the administrative record.

15 The appellant had the burden of proof in this
16 case. Did the appellant carry that burden of proof in
17 showing that the actions that took place were inconsistent
18 with the law?

19 The answer to that is no. They have not carried
20 their burden of proof. They have offered argument and
21 further interpretation and opinion unsubstantiated by the
22 facts in the record. That is what they have offered.
23 That does not constitute substantial evidence that would
24 give your Board a firm foundation to find that the actions
25 taken by the County LEA are inconsistent with the

1 Integrated Waste Management Act. Let alone that this
2 argument, that has been purported to be substantial
3 evidence, was never before the hearing officer at that
4 time.

5 The hearing officer's report is succinct. It is
6 clearly based on exactly what you are being called to do
7 today: apply the law to the facts presented. And that
8 decision was to uphold a well-defined, well-intentioned,
9 well-executed cease and desist order.

10 I'm not going to go into more of this argument,
11 because I believe that your staff report has articulated,
12 very clearly, all of the legal arguments and the issues
13 presented here. I do want to emphasize again that Public
14 Resources Code Section 40191 and Title 14 of the
15 California Code of Regulations, Section 17388, paragraph
16 (K)(1) as well as Subdivision U, all define the
17 construction debris and demolition waste and inert
18 materials that were brought on site by Mr. Fishback as
19 solid waste.

20 Again, that was evidence that was presented and
21 was upheld by the hearing officer, independently, hearing
22 not only the evidence presented by the Environmental
23 Health Division but some of the same people that are here
24 today, speaking before you, under testimony, in that
25 transcript. And their testimony was clearly there. It

1 was considered. It was found not to be substantial.

2 Appellant secondly denies the these activities
3 amount to a regulated inert debris disposal facility
4 because he's not disposing of the waste but is, instead,
5 operating a CDI transfer processing facility covered by
6 Article 5.9 of Title 14 of the California Code of
7 Regulations. This argument is without merit.

8 Appellant cannot, at this point in time, claim
9 that Title 14, California Code of Regulations, Section
10 17388.2, which is an exception from the solid waste
11 disposal regulations as an engineered fill operation, and
12 yet at the same time concurrently maintain that the
13 material he brought onto his property is not solid waste.
14 You can't have it both ways. Even if he was able to show
15 that he was trying to seek this exemption, under 17388.2,
16 appellant cannot and did not qualify for that exemption,
17 because he has not obtained the required local permit; he
18 has not reduced the particle size of the material brought
19 on site to 2 inches or less; it is not part of a recycling
20 activity; and certainly, he did not conclude his work
21 within the two years of commencement.

22 None of those elements necessary for that
23 exemption can be shown if, in fact, that is his argument
24 at this point in time.

25 So again, you can't have it both ways. Is it

1 solid waste that is -- then it's subject to an engineered
2 fill-type of situation that Mr. Conaway talked about. And
3 if that's the argument, I have yet to hear that that is
4 the position that's taken place by appellant at this point
5 in time.

6 Or is it Mr. Eowan's argument: It's not solid
7 waste and this is not the purpose of this regulation? So
8 here we have now the appellant speaking with two voices.
9 What is it? And it is consistent with the continued theme
10 of denial. "I'm not really doing anything wrong. I'm not
11 breaking the law. I'm doing what I'm supposed to do
12 because I own this land."

13 Well, we live in the United States of America, and
14 our freedoms are defined by the law. And that's a very
15 core concept. And I don't think that that's making any
16 sense to the appellant at this point in time. Yes, there
17 is freedom to develop your land. Yes, there is freedom to
18 get the maximum value out of the land. But within the
19 law. And the law is clear in this case from the state
20 level, from the local level, and from the ordinance level.
21 You cannot deny that. It is clear on its face, the plain
22 meaning rule applies here.

23 And I go back, again, to the first thing,
24 Chairperson Brown, that you made: This is an appeal of
25 the hearing officer's decision. We're not here to rethink

1 the statute, the regulations, or the ordinance. That's
2 not the purpose here. It's the appeal of the hearing
3 officer's decision.

4 And I go back to Mr. Stratton's comment. We fully
5 support the staff's recommendation. We believe it is on
6 solid, legal, and factual grounds. And we would urge this
7 Board to find that the hearing officer's decision is valid
8 and to uphold that cease and desist, that the LEA issued
9 back in May of 2006.

10 And at this point in time, if we have any time
11 remaining, both Mr. Stratton and I are available for
12 questions.

13 CHAIRPERSON BROWN: I think we will hold our
14 questions for the question and answer period at the end
15 and move directly to Mr. Bledsoe.

16 STAFF COUNSEL BLEDSOE: Thank you, Madam Chair.
17 Michael Bledsoe speaking on behalf of the Board staff
18 today.

19 Howard Levenson, Deputy Director for Permitting
20 and Enforcement will introduce our discussion.

21 DEPUTY DIRECTOR LEVENSON: Thank you, Mr. Bledsoe.
22 And good afternoon, Board Members.

23 I'm Howard Levenson, deputy director for
24 Permitting and Enforcement.

25 And I would like to begin staff's presentation by

1 setting some context and briefly summarizing our position
2 on the substance of the appeal.

3 We first heard of this situation in late 2005 via
4 referral from the governor's office of a citizen's
5 complaint. Upon receipt of that referral, we contacted
6 the local LEA. We subsequently proceeded to assist the
7 LEA and reviewing the applicable regulations. And at the
8 request of Mr. Fishback and the LEA, went with the LEA on
9 February 22nd, 2006, to inspect the site. This is our
10 standard process for handling complaints and assisting
11 LEAs.

12 At mr. Fishback's request, Permitting and
13 Enforcement staff also arranged for him to meet with staff
14 from our other Diversion, Planning, and Local Assistance,
15 and Waste Prevention and Market Development. In essence,
16 we treated this situation just as we would treat any other
17 situation.

18 Now, Mr. Fishback's challenge of the hearing
19 officer's decision centers on the application of the
20 Board's construction and demolition waste and inert debris
21 disposal regulations, or CDI regs, which, among other
22 things, govern the disposal of type A inert debris. As
23 everybody has said, the primary questions here are whether
24 Mr. Fishback disposed of materials that constitute solid
25 waste? And if so, how the LEA should have addressed this

1 in accordance with the regulations.

2 The Waste Board adopted these regulations in 2003,
3 the regulations that govern both the transfer and
4 processing C&D materials and the disposal of C&D debris
5 and inert debris. The regulations established state
6 minimum standards and permit tiers to assure that the
7 handling of these materials are conducted in a way that
8 protects public health and safety and the environment.
9 They also include provisions to foster reuse and recycling
10 of these materials.

11 Now, in developing these regulations, the Board
12 considered health and safety and environmental issues,
13 including those associated with the illegal disposal of
14 C&D materials at the Cajon site in San Bernardino County,
15 and Archie Crippen site in Fresno County.

16 It determined that concrete being deposited on
17 land constitutes disposal. Unless there was some
18 engineering plan and other factors that would qualify an
19 activity as being excluded, the Board has since seen other
20 situations that continue this historical pattern,
21 including La Montana in Los Angeles and the Filbin
22 situation in San Luis Obispo County.

23 Now, the record indicates that for purposes of
24 erosion control, Mr. Fishback arranged for dirt,
25 fully-cured concrete, stucco, and brick, that had been

1 salvaged from construction sites to be deposited on his
2 land. This fits the definition of type A inert debris.

3 There are two provisions in the regulations that
4 could provide relief from the requirement for a solid
5 waste facilities permit.

6 Now, it's staff's understanding that the LEA
7 requested and Mr. Fishback submit information that might
8 qualify the activity at his property under either of these
9 provisions. First, we have the inert debris
10 engineered-fill activities that are undertaken for
11 construction projects. As has already been noted, these
12 are excluded if they have local permits, if they use only
13 uncontaminated concrete or fully-cured asphalt, which has
14 been reduced in particle size to less than 2 inches, and
15 which concludes within two years from the commencement of
16 the activity. Mr. Fishback's activities fail to satisfy
17 these requirements.

18 Second, the regulations also allow for inert
19 debris engineered-fill operations to qualify for what's
20 known as an enforcement agency notification, which is not
21 a solid waste facilities permit.

22 If they exceed one year in duration and they are
23 conducted according to specifications prepared and
24 certified, at least annually, by a civil engineer or other
25 similar professional. Now, it may have been possible for

1 Mr. Fishback to qualify his erosion control work under
2 this provision, but it's staff's understanding that he did
3 not provide engineering plans that the LEA could deem
4 adequate.

5 I will just pause here to mention -- respond to
6 Mr. Eowan's statement -- I'm not sure who actually said
7 it, but someone raised the statement that I had indicated
8 that the plans were inadequate, which is a
9 mis-characterization. I did, as a courtesy, indicate to
10 Mr. Eowan that we had looked at the materials in the
11 record and that there was not information that was
12 sufficient enough for us to determine one way or the other
13 whether there was an engineering plan that met our
14 regulatory provisions under 17388 of Title 14.

15 At any rate, the LEA determined that Mr. Fishback
16 owns and operates an inert debris type A disposal
17 facility. Now, the Board, as I mentioned, has dealt with
18 several similar situations over the past ten years, where
19 property owners claim that they were using what would
20 otherwise be waste materials, for the benefit of their
21 properties, or for future reuse. In each case, the Board
22 has determined that the wastes were illegal disposal
23 sites.

24 In San Bernardino County, at the Cajon site, the
25 property owner deposited construction debris and green

1 waste on his property to protect it from occasional
2 floodwaters. In Sonoma County, property owners used waste
3 tires to protect their lands from erosion. Even materials
4 that have some value if they were processed have been
5 found to be illegally disposed solid waste, when the
6 property owners failed to process them as required by
7 Board regulations, such as at La Montana and the Filbin
8 site in San Luis Obispo County.

9 So in conclusion, and for the reasons stated
10 above, and on the basis of the information in the
11 administrative record, staff recommends that the Board
12 uphold and affirm the decision of the hearing officer.

13 And I will turn it back to Mr. Bledsoe for more
14 details on this -- on our presentation.

15 STAFF COUNSEL BLEDSOE: Thank you very much.

16 My argument this afternoon is going to be quite
17 brief. I believe that we have stated the facts and have
18 applied the Integrated Waste Management Act and the
19 Board's regulations to those facts. That's been
20 adequately discussed in the staff report and has been
21 summarized today.

22 I would like to offer, if I might, just a bit of,
23 what Elliot might call, context. And it really becomes
24 apparent from hearing the discussion by the appellant.
25 What the Board has done with regard to the regulation of

1 inert debris from construction sites, which is the type of
2 material that is different from, has less potential for
3 environmental harms and public health and safety harms
4 than typical municipal solid waste. The Board has set up
5 different and lesser levels of regulations for the
6 handling and for the disposal of such materials of inert
7 debris in particular. And in fact, in order to
8 accommodate appropriate beneficial uses of this material,
9 has set up various exemptions and extremely low level
10 oversight provisions for activities; for example, inert
11 debris engineered-fills. If you have a big hole and you
12 want to put concrete in it, there's a way to do that as
13 set out in the Board -- in the Board regulations.

14 But what the Board does not allow is the
15 unregulated disposal of those materials. And the reason
16 is that there are potential public health and safety and
17 environmental harms that could result from that.

18 So the -- the fact that Mr. Fishback might have
19 been able to satisfy those requirements, for an exemption
20 or for an EA notification rather than permit, really is
21 beyond the point, right now, since he has made no effort
22 to do that. But it's very clear that Board regulations
23 don't allow the unfettered disposal of these materials.

24 The arguments that you've heard from appellant
25 today are essentially that, "Look, I have a good reason

1 for wanting to use this material. I've got a bad erosion
2 problem at my property. This concrete and other inert
3 debris works well for solving that problem, so I'm just
4 going to go ahead and fill it up the way I see fit,"
5 honestly, is the argument.

6 Frankly, the Sonoma waste tire property owners had
7 a better argument. That they had the same argument with
8 respect to the use of solid waste: I need waste tires to
9 fill up gullies. They actually had a government agency
10 saying, "Hey, this is a good idea." Well, that situation
11 does not exist here.

12 I suppose it might -- might be distressing to
13 hear, you know, respected persons arguing before you that
14 the regulations did not apply because there's a good use
15 for this material. But the Board's regulations already
16 allow for such beneficial uses provided that you follow
17 the rules that the Board has set up for the safe use of
18 that material.

19 So I think that there's certainly no question that
20 inert debris of a certain type that we call -- we define
21 as type A inert debris is being permanently placed, i.e.
22 disposed on the Fishback property; there's been no effort
23 to meet the requirements for inert debris
24 engineered-fills; nor does the activity qualify for the
25 two exemptions: engineered-fill activities and

1 inert-debris fill activities. So we simply have an inert
2 debris disposal facility. That's the way our laws apply
3 to the facts of this matter.

4 A registration tier permit is required for that
5 activity. Mr. Fishback has not applied for that. The
6 cease and desist order issued by the local enforcement
7 agency was necessary. Our statute requires the LEA to
8 issue a cease and desist order when an operator is
9 carrying out an activity for which a permit is required,
10 but the operator has no permit.

11 The hearing officer conducted lengthy hearings,
12 heard testimony by both sides, reached the conclusion that
13 the cease and desist order is justified.

14 The task before the Board today is to decide
15 whether the hearing officer made the right decision. And
16 the Board may overturn that decision only if it finds,
17 based on substantial evidence, that the cease and desist
18 order is inconsistent with the Integrated Waste Management
19 Act.

20 I submit that there is no substantial evidence
21 that the cease and desist order is inconsistent with the
22 Integrated Waste Management Act, and urge that you uphold
23 the hearing officer's decision.

24 Thank you.

25 CHAIRPERSON BROWN: Thank you, Mr. Bledsoe.

1 We're about halfway here. Before we go into the
2 rebuttals and the public comment, I would like to take a
3 five-minute break for everybody to stretch. And we'll be
4 back here in five minutes, at 3:30. And we'll start with
5 the rebuttal for the appellant.

6 (A break was taken in proceedings.)

7 CHAIRPERSON BROWN: Thank you. 3:30.

8 Let's go ahead and move to the appellant's
9 rebuttal. Ms. Neiswender?

10 MS. NEISWENDER: Thank you, Madam Chair.
11 Mr. Astor.

12 MR. ASTOR: Thank you, Madam chair. A lot of
13 material here. Let me see if I can get through. Ventura
14 County Deputy County Counsel or Assistant County Counsel
15 stated among other things the following: Fishback's
16 entire case is based on denial, and Wayne Fishback
17 attempts to complicate a simple matter.

18 I don't know what would be more simple than my
19 assertion that this is not solid waste. You know, if you
20 were to measure the amount of time that was devoted to
21 process and hearings and all this other stuff and
22 discussion of potentially applicable exemptions that
23 was -- all this was presented in the appellee's argument,
24 a great deal of that relates to the fact that the
25 assumption is, this is solid waste.

1 If you accept our position that it's not, and
2 that's as simple analysis as you can get, you never get to
3 all these conversations that are being had.

4 We've also been told that the reading statutes
5 must be done by using their plain meaning. I hope Counsel
6 is not saying we don't defer to the state Supreme Court's
7 interpretation of the very statute at issue. If any
8 attorney is going to assert -- and I'm not accusing him of
9 doing this -- that you begin and end with an evaluation of
10 the statute of the cases interpreting it, that's not the
11 kind of opinion that one wants to place their reliance and
12 faith in. The state Supreme Court felt that the statute
13 at issue was sufficiently ambiguous such that it felt the
14 need to hear the case and render a published opinion. And
15 the purpose of rendering a published opinion is to guide
16 future disputes of the same or a similar nature. It's
17 utterly proper to consider and go beyond the plain meaning
18 of the statute, because the meaning of the statute was not
19 plain.

20 I hasten to add that we really are not seeking to
21 discourage the LEA from doing its job. We really are not.
22 If they can find someone disposing of solid waste on their
23 property, they ought to go out and regulate the heck out
24 of them. But the threshold question remains: Is it or is
25 it not solid waste? And if it's not, they have no

1 business. There is ample oversight from other agencies
2 and briefs are replete with the information about what Mr.
3 Fishback had indeed gone through to get this site
4 authorized. He just didn't go to the LEA to get their
5 approval because he didn't feel he needed it.

6 Kelly Astor doesn't have a pilot's license because
7 I don't fly. I don't have a vet's license, because I'm
8 not a vet. The idea that a license is out there to be had
9 and is therefore required to get one is the most crazy
10 notion I've heard today. He's only required to get those
11 authorizations that are necessary for him to conduct his
12 activity.

13 The basis of the County's position, which is
14 endorsed by the LEA -- by the way, I'm interested in all
15 the affection between the LEA and the Waste Board staff.
16 And the fact that they have come to the same conclusion
17 makes our job harder. I concede that. But it doesn't
18 make their position right, just because they both went
19 that way.

20 The essence of their position really is that C&D
21 material, in all cases, is solid waste. That's the only
22 conclusion you can reach here, because they keep citing to
23 a regulatory framework that talks about taking C&D
24 material and applying it to land. It's solid waste. We
25 regulate it. It's subject to the regulations.

1 Well, ladies and gentlemen, C&D waste -- or
2 material is not in all case regulateable solid waste.
3 It's not just.

4 I mean, there's an unending number of examples I
5 can give you. I can take some broken concrete from some
6 site and I apply it to make a sidewalk in my backyard.
7 That's not solid waste. And it's being recycled,
8 incidentally, when I do that.

9 Mr. Stratton talked about the LEA's statutory
10 responsibility to enforce state law. He indicated the
11 material going to the Fishback property is, by definition,
12 solid waste. Well, we've exhausted that argument. The
13 threshold, the beginning, is to evaluate whether or not it
14 is solid waste. We assert that it is not. Because it's
15 not, everything else in their position fails.

16 I do agree with Mr. Stratton's comment to the
17 extent that he stated in Article 5.95 of Title 14 --
18 that's to say, when we cited to that section, he says, the
19 Waste's Board's interpretation of this issue allowed
20 statewide implications. I couldn't agree more.

21 If this Board decides that this activity in
22 question, indeed, is solid waste disposal, the chilling
23 effect that's going to occur in terms of recycling is
24 going to be difficult to overestimate. And I'll tell you
25 something: At the very time this Board is looking at

1 placing additional emphasis on market development, on
2 programs rather than numbers, you are going, precisely, in
3 my judgment, the wrong direction, were you to sustain the
4 hearing officer's cease and desist order.

5 Wayne Fishback needs no exemption. He needs no
6 safe harbor. He needs no waiver. He's immune. His
7 material is not solid waste. His activity is not solid
8 waste disposal.

9 I don't know of anything that's inconsistent with
10 regard to our position. Yet, I hear claims we have been
11 inconsistent in how we are arguing this. It seems to me,
12 from day one, we've been very clear that we didn't seek
13 approval that we didn't deem necessary.

14 We're asking a lot of you today. We're asking you
15 to disregard the decision below and to disregard your
16 staff's recommendation supporting that decision.

17 Actually, that's a misstatement. We're not asking
18 you to disregard those things. We ask that you consider
19 and reject them.

20 By the way, there's also attention given in the
21 appellant's brief and in argument today about what
22 happened in Sonoma or San Bernardino or somewhere else. I
23 don't much care what happened in those other places. I
24 know we're not dealing with waste tires here. But even if
25 it was the same material in question, and I have no

1 knowledge of what happened or what the arguments were
2 raised there. And the precedent that those decisions may
3 have created shouldn't bind us.

4 The case law -- I keep getting back to that. The
5 case law is what's going to govern us. You have a job to
6 do. The LEA has a job to do. We honor that. We
7 encourage you to do it. But there are limits to your
8 jurisdiction. And one limit is, you don't address the use
9 of material that doesn't constitute solid waste. With all
10 due respect, that's not a part of what you do.

11 Mr. Bledsoe attached significance to the fact that
12 Mr. Fishback made no effort to qualify for an exemption.
13 He didn't need one.

14 Ladies and gentlemen, process is no substitute for
15 outcome. There has been a lot of process here. And
16 nobody's arguing, Mr. Fishback has been denied due
17 process. We've had a couple of hearings. There's been a
18 lot of back and forth with staff. But the cease and
19 desist order is inconsistent with the Integrated Waste
20 Management Act. And we urge you to overturn the hearing
21 officer's determination.

22 Thank you.

23 MS. NEISWENDER: Madam Chair, honorable Board, we,
24 before we wrap up today, wanted to talk a little bit about
25 who Wayne Fishback is and what he's doing. I don't think

1 we have done that in the two days we have been in front of
2 you.

3 Mr. Fishback mentioned that he is, in fact, an
4 architect. He has been for more than 30 years. He is a
5 builder of many buildings, very large structures,
6 including the Stanford University Medical Center, City of
7 Hope Medical Center, buildings in Chicago and in New York
8 and in Hong Kong. And in all those years of experience,
9 working with some of the largest firms internationally.

10 He's never been issued a stop work order. He's
11 never had a problem like this before, as a professional.
12 This was a surprise to him.

13 Mr. Kwong indicated in his remarks that he just
14 said, "I get to develop my land as I see fit and choose to
15 ignore the laws." That's not what happened. As was
16 testified below, and as I believe we mentioned in the
17 briefs that we submitted as well, he went to the planning
18 department in Ventura County. He went to Public Works
19 Department. He went to the Resource Conservation
20 Division. He obtained a HECO plan. He talked to everyone
21 who he could talk to, to find out what regulations were
22 governing his actions.

23 And it was only after a year of speaking to these
24 folks, that in December of 2005, based on a complaint from
25 a local activist, who wants to preserve this land,

1 indefinitely, as open space, that Mr. Fishback was
2 investigated by the Waste Management Board, and the LEA
3 got involved.

4 The LEA is looking for a way to classify Mr.
5 Fishback's operation as a solid waste facility, because
6 that's what they do. It would be like asking someone who
7 speaks one language to try to think and act in a different
8 language. They see what is placed there and say, "That's
9 solid waste," because that's what they are looking for.
10 But if you look at this in a broader picture, as we have
11 been trying to talk about this afternoon, this is
12 diversion. This is reuse at its best.

13 In the definitions in 17388, it talks about source
14 separated materials, materials separated for reuse. Those
15 definitions talk about materials just like this, that
16 never enter the waste stream. That's in the definitions.
17 And this material never entered the waste stream and
18 therefore never became solid waste.

19 Although Mr. Astor has referenced the language in
20 the Palm Springs case, I actually wanted to quote from it.

21 The Supreme Court said, "Selling and other methods
22 of disposition by which the owner receives or donates the
23 value of recyclable materials are not discarding and not
24 subject to the Act. The fundamental purpose of the Act is
25 to reduce the amount of material entering into the waste

1 stream. The buying and selling of materials in the
2 marketplace is inapposite to that purpose, because those
3 materials remain in circulation and do not enter into the
4 waste stream."

5 That's what the Supreme Court said 12 years ago.
6 And as Mr. Astor mentioned, we don't look at the plain
7 language of a statute in a vacuum. We look at it how it's
8 applied on the ground, how it's applied to real people in
9 real situations. Sometimes courts are needed for that.
10 We don't stop at looking at 40191 and say, "Well, okay.
11 It's solid waste because it says it's solid waste." We
12 listen to the Supreme Court. We listen to the
13 interpretations of the statute.

14 Mr. Fishback talked to professionals in this
15 field. He talked to an engineering geologist, Nick
16 Brouwer. He talked to Phil Sherman, who has 40-plus
17 years' experience as a civil engineer. He talked to the
18 people at the RCD, the Resource Conservation District.
19 Everybody is telling him, "This is how you do it. You're
20 not solid waste. This is how we proceed."

21 It was only when we got to the agency that looks
22 at everything in the context of its statutory obligations
23 that we ended up before you today.

24 And I would suggest to you that what we have here
25 is simply an agency that's extending its jurisdiction,

1 logically, in their heads, to where it ultimately will go.
2 But that is in direct contradiction to what the Act
3 intends to do. As the Supreme Court says, "The recyclable
4 materials are not discarding and are not subject to the
5 Act."

6 If it's not subject to the Act, these donated
7 materials, that are on the Fishback ranch, they are not
8 solid waste. And therefore, we do not need a permit.

9 One final thing: We would suggest today that you
10 take the time to review these materials, to go back and
11 read some of these reports, to read some of the transcript
12 testimony that we've talked about, to perhaps read the
13 Palm Springs case one more time, if you haven't memorized
14 it already. Read these things.

15 You do not have to issue a decision today. Think
16 about it. We would like to take the time to look at this,
17 because we truly believe would be, unfortunately, between
18 all of us, dozens of years of experience and interpreting
19 the law and interpreting the Waste Act and putting things
20 together, and in Mr. Fishback's case, decades of
21 experience working with public agencies, we sincerely
22 believe that we have interpreted these statutes correctly,
23 and that we are doing what is right.

24 With that, we would allow additional rebuttal by
25 the LEA.

1 CHAIRPERSON BROWN: Thank you. Actually, Mr.
2 Kwong?

3 MR. KWONG: Thank you, Madam Chair and members of
4 the Board for this opportunity to have a moment of
5 rebuttal here.

6 There were four presentations in particular that
7 caught the attention of the LEA that need a minimal amount
8 of response to: They are Mr. Astor's argument with
9 regards to the law; Ms. Neiswender's stepping in place and
10 making the engineering argument on behalf of Mr. Fishback;
11 there's Mr. Conaway's argument; and then there's
12 Mr. Eowan's policy argument.

13 First the legal argument: I can understand
14 Mr. Astor's affection for this case and for the fact that
15 he would like to use it as the, how shall I say, talisman
16 or magic wand for all issues regarding solid waste. But
17 as he has already indicated in his argument -- and this
18 part I agree with him -- you have to read these cases in
19 context. And the one thing I really agree with Mr. Astor
20 about is that case is about a franchise agreement.

21 The case is about a franchise agreement with
22 regards to who has the ability to recycle certain types of
23 materials. It doesn't have to do with hillside
24 stabilization. It does not have to do with creating a
25 pastureland for Arabian horses. It has nothing to do with

1 making sure that that beautiful land in Ventura County is
2 developed to its maximum extent feasible. It has nothing
3 to do with that.

4 So you have to read these cases within context.
5 And that, I agree with Mr. Astor. And that, as lawyers
6 with training -- that is what we do.

7 But that still comes back to the language in 40191
8 of the Public Resources Code and Section 17388 of Title
9 14, as it defines solid waste.

10 And I defy anyone to say that they are reading
11 this -- and if I read it correctly, "Solid waste means all
12 putrescible and non-putrescible solid, semisolid, and
13 liquid waste including garbage, trash, refuse, paper,
14 rubbish, ashes, industrial waste, demolition, and
15 construction waste." There's not much there than the
16 plain meaning of that language.

17 So I would also like to point out that the Waste
18 Management Case that is being referred to, Document 4,
19 Page 312, clearly indicates what's in the record of what
20 that case means. And the Supreme Court is saying,
21 "whether or not material was discarded." That's the big
22 question. And that is how, I think, it is properly to be
23 read: Was this material discarded in that case?

24 And I think, Mr. Bledsoe, in his briefing, has
25 done a wonderful job of explaining and explicating that

1 case for you and trying to clear away, again, the
2 misunderstanding and a misapplication of that case law and
3 that holding.

4 I would also like to point out that even though
5 the Waste Management Case is a case from the state Supreme
6 Court, it is persuasive to a certain degree, because we
7 respect what the Supreme Court says, but again, on the
8 facts that were presented to the Supreme Court.

9 So it's persuasive but it's not controlling. And
10 that's the question you have to ask yourself: Is it
11 controlling?

12 Answer, no.

13 Ms. Neiswender took the role of engineer in this
14 case and argued that there is something called a Hillside
15 Erosion Control Ordinance plan that was given to Mr.
16 Fishback.

17 And I'm quoting directly from Document 4,
18 Page 198. This is the section of the HECO plan that was
19 issued regarding engineering plans. Quote, "Engineering
20 plans (stamped and signed) are enclosed, reflecting the
21 parcels, drain fields, future fill areas, previous fill
22 areas (not a part of this plan)" -- previous fill areas
23 not a part of this plan -- "and quantities for each.

24 "The NRCS Field Office Technical Guide
25 specifications listed will apply where the site specific

1 engineering is not noted. Work is expected to begin
2 June 2006 and finish within one year."

3 It has nothing to do with what the case is about,
4 which is violations that we allege took place between the
5 years 2004 and May 2006, when we issued that cease and
6 desist order. It clearly states that that HECO plan does
7 not -- is not a part of this plan; previous fill areas.
8 They are not a part of this fill plan.

9 So any reference to a HECO plan, entitlement,
10 permit, or any type of authority given to Mr. Fishback to
11 do what he did out there cannot be found in the HECO plan
12 whatsoever.

13 Document 3, Page 160 through 162, is a letter from
14 Mr. Fishback. This letter was cited by Ms. Neiswender to
15 indicate that there was engineering plans given to the
16 LEA. That could be the furthest thing from the truth of
17 those documents. What those documents purport to do is
18 summarize contacts between Mr. Fishback and the LEA. When
19 questions were raised at those meetings of where this
20 engineering study was, all Mr. Fishback says in that
21 letter is, "Oh, they are my engineer and myself," then
22 discussed the engineering with the LEA. Is there anything
23 attached to that letter that looks like an engineering
24 plan? No. Was anything offered that looks like an
25 engineering plan? No.

1 All it says there is, "We discussed our engineering."
2 Well, it's just like anything else we discuss without
3 providing solid evidence upon which to base that decision.

4 So with regards to Ms. Neiswender's engineering
5 argument, again, we are left scratching our heads here.
6 What is the argument that Mr. Fishback is making? Is it,
7 as Mr. Astor continually purports to say, is a simple
8 question of, this is not solid waste. Or is this the
9 engineered fill that he purports to have offered to the
10 LEA? And frankly, we still haven't heard definitively
11 from that side, what is their argument.

12 Look, what was before the hearing officer was this
13 question of whether it was solid waste, and it was
14 definitively argued then and decided that this was solid
15 waste that was dumped on his land.

16 Mr. Conaway, based on my hearing of his testimony,
17 referred to Title 27. Title 27 has to do with closures of
18 a solid waste dump. And when you talk about best
19 management practices for the closure of a solid waste
20 dump, then I guess it is some admission that this is solid
21 waste. So Mr. Conaway's argument seems to be in
22 contradiction with Mr. Astor's argument.

23 Then we go to Mr. Eowan's argument, which is a
24 policy argument. Frankly, that was the simplest one for
25 me to understand, because it's the simplest one to put

1 down.

2 I would like -- sometimes Boards would like to sit
3 as a mini legislature. That's not the case. You are a
4 Board that is defined by the law that was passed by the
5 Legislature and signed by the governor. That's the law.
6 You are not asked here to make the law. You are asked to
7 apply the law to the facts.

8 I can understand the policy arguments that
9 Mr. Eowan's taking. And they may have great residence in
10 the assembly hearing rooms and the senate rooms down the
11 street. But not here.

12 So for all the policy arguments and the passion
13 which he brings to what should be the case with regards to
14 solid waste regulation, that does not have any bearing on
15 this case.

16 So that is the rebuttal that we would like to
17 offer at this point in time, and leave both Mr. Stratton
18 and I open for any questions that you might have or any
19 clarification.

20 CHAIRPERSON BROWN: Thank you, Mr. Kwong.

21 We move now to public testimony. And we have one
22 person, currently, who has requested to speak. And that's
23 Mr. Robert Mionske.

24 MR. MIONSKE: Good afternoon. My name is Robert
25 Mionske, and I live right across the street from the

1 Fishback dump site. And I'm here representing at least a
2 hundred people that live in the surrounding community.
3 They are not able to come here, but I'm voicing some of
4 the concerns that they have right now.

5 They are negatively impacted by this dump
6 operation. And I'm going to try to give a human
7 perspective to what has happened and what we would like to
8 see happen with the Fishback dump. And I'm also here to
9 support the Ventura Environmental Health Department in
10 their enforcement action.

11 And basically, this is a tale of two worlds. And
12 in our world, and I'm talking about the general public,
13 there's laws, there's rules, there's codes. And those are
14 generally voluntarily complied with.

15 Now, there's another world, and that's the world
16 of Wayne Fishback and I call it "Wayne's World." He
17 appears to do whatever he wants and rarely complies with
18 laws, rules, or codes.

19 In our world if we break a law, we have to pay the
20 consequences for it. In "Wayne's World," if he breaks the
21 law, he says: "I don't have to have -- I'm not underneath
22 your jurisdiction," or "You've interpreted the law wrong."
23 Or he'll try to find a loophole, because he thinks he's
24 above the law.

25 In our world, we get permits. We follow the

1 rules.

2 In "Wayne's World," he willfully does what he
3 wants. When he gets caught, he strikes out at the people
4 who complained about his actions. He sues them. And he
5 tries to quiet them up.

6 In our world, class A material, that inert
7 material that you are talking about, is class A inert
8 material.

9 In "Wayne's World," class A material is whatever
10 his imagination wants to call it.

11 In our world, solid waste facilities are
12 regulated. They are inspected.

13 In "Wayne's World," solid waste facilities become
14 a ranch. They become an agricultural operation. He can
15 run it anyway he wants to, with no oversight.

16 In our world, there are public health and safety
17 concerns. In "Wayne's World," he has concerns only about
18 his profit and his ability to do whatever he wants with
19 his property.

20 And finally, we need to bring Wayne into our
21 world. The days are long gone that we can let people like
22 Wayne Fishback do what they want. 20 years ago, 40 years
23 ago, 60 years ago, people did these kinds of actions and
24 the environment is suffering from it today.

25 And our environment cannot stand self-regulation,

1 self-inspection, self-determination of whatever class of
2 waste he wants to call it.

3 And you should deny his appeal. And after
4 listening to this -- to the arguments, if Wayne was to be
5 successful with this argument that he has, that what he's
6 doing is okay, then I have an adjoining piece of property.
7 I have a neighbor that has an adjoining piece of property.
8 And we would be willing to do the same kind of operation
9 that he is and making the kind of returns that he is, if
10 what you said is, anybody can open up, and he is not
11 underneath the rules with this inert material.

12 And one more thing: I have -- Wayne has forced me
13 into being here today. He's invited me, so to speak, to
14 come here. And I have a better appreciation and
15 understanding of how government works. And I've seen it
16 with the Ventura Environmental Health Department. And it
17 is absolutely amazing. It has changed my mind and my
18 opinion about government. And if you people do half the
19 amount of work that they have done, thank you very much
20 for being there and protecting us.

21 Thank you.

22 CHAIRPERSON BROWN: Thank you, Mr. Mionske, for
23 being here.

24 We next go to rebuttals by both the appellant and
25 the LEA. And I will invite the appellant to go first.

1 MS. NEISWENDER: Very briefly, Madam Chair.

2 Mr. Kwong made some comments about the legal
3 arguments presented today. He indicated that the Palm
4 Springs case was merely about a franchise agreement.

5 Again, we would respectfully request you go back
6 and take a look at that case. I don't think there's any
7 question that it is not limited, merely, to that issue.
8 And in fact, in that case, at Page 47, they interpret
9 40191, the code section that Mr. Kwong raised. It's the
10 definition of solid waste. They very specifically say
11 that they view that all items enumerated in Section 40191,
12 Subdivision A, on waste, regardless of their value and
13 whether they have been discarded is called into question
14 by the many types of items enumerated. The obvious
15 intuitive and correct response to the contention would be
16 that the property has value. And the owner has not
17 discarded the property, if he sells it, which was the
18 issue in Palm Springs. And I think it does have direct
19 application to the facts of this case.

20 His comments concerning the HECO plan. He quoted
21 from the HECO plan, saying that the HECO plan is
22 prospective rather than retroactive. That issue was
23 raised at the LEA hearing level, by Mr. Stratton.

24 And in response, Mr. Sherman testified, at Pages
25 51 through 53, of Volume 7 as to that exact point. And he

1 said that the RCD had talked to them about what are we
2 going to do about stuff you've finished versus what you
3 are about to do. And it was determined by the RCD that
4 what had already occurred was within the 10 percent
5 exemption to the Hillside Erosion Control Ordinance. And
6 therefore, no plan was necessary. That was specifically
7 addressed in the Sherman testimony. It was raised below.
8 It was refuted below. And we would suggest that you read
9 that testimony.

10 Finally, Mr. Kwong made a comment about the fact
11 that this Board is not a legislative body, and you should
12 not attempt to legislate.

13 I think you have more discretion than that.
14 However, diversion is listed as the top priority in the
15 Integrated Waste Management Act. And it is, in fact, the
16 law in the state of California.

17 The importance of diversion is repeated often, in
18 the Web site materials that was put together by this
19 Board's staff; in the written materials, that are
20 circulated in the state of California. It is clearly a
21 top priority. Therefore, what we are doing at the
22 Fishback ranch is within the statutes; it's within the
23 regulations. We are not solid waste. And we ask that you
24 support this appeal.

25 CHAIRPERSON BROWN: Thank you. Mr. Kwong?

1 MR. KWONG: Thank you, Madam Chair for this --
2 another opportunity for rebuttal.

3 I would like to limit my remarks to something
4 that, again, was said by the appellant about a chilling
5 effect. And then secondly, something that was raised by
6 Mr. Mionske, that I think is very pertinent to this case.

7 First, the chilling effect. The argument was made
8 by the appellant that there is going to be a chilling
9 effect if you find that the material that is being -- that
10 was being dumped on the Fishback property is solid waste.

11 I would argue that the opposite is true. The
12 chilling effect will be on those who have legally and
13 properly gotten permits to use this material in the proper
14 way.

15 The chilling effect would be to tell these people,
16 you know, forget about these regulations. They don't mean
17 anything, because people like Mr. Fishback can do this,
18 and actually hurt the business of those who are
19 legitimately using this CDI.

20 We talk about market forces. Market forces only
21 exist, and true markets only exist if laws are upheld;
22 that cheaters and fraudulent people cannot do as they
23 please. Markets exist because laws are there to protect
24 against that type to have activity. I'm all for markets.
25 And the market chilling effect will be to allow improper,

1 illegal activity, like what Mr. Fishback did, to exist and
2 to propagate and to go unpunished.

3 There's a cease and desist order that needs to be
4 upheld. It was upheld by the hearing officer. The same
5 facts are before you. The same testimony is before you.
6 And nothing in that testimony was able to sway the hearing
7 officer into thinking that the HECO plan somehow
8 legitimized the activities at the Fishback ranch.

9 I would like to end with a story. And this is
10 where Mr. Mionske comes in. A story about a regulatory
11 during the Great Depression, during the Roosevelt
12 Administration. And he was the head of the Wage Labor
13 Board. And he was asked about his philosophy about
14 enforcement. And he sat back in his chair, and he said,
15 "Well, we know that 75 percent of all people will
16 voluntarily comply with all regulations that are legally
17 put forward. And we know that 5 percent of the people
18 will violate that law."

19 "What about the other 20 percent?" the inquirer
20 asked.

21 "Well, the other 20 percent," he said, "are
22 waiting to see what happens to the 5 percent."

23 And I think that theory of enforcement and that
24 view, world view, of this issue is so important to be
25 reminded of. And that goes back, again, to the chilling

1 effect; they are waiting to see what happens to the
2 5 percent or to Mr. Fishback.

3 Thank you.

4 CHAIRPERSON BROWN: Thank you, Mr. Kwong.

5 Do we have any questions from Board members or any
6 of the people testifying?

7 Michael, I'm sorry. Do you have any closing
8 comments?

9 STAFF COUNSEL BLEDSOE: Just three very brief
10 ones, Madam Chair. Thank you.

11 If there's any question, in your minds, with
12 respect to whether this material is solid waste, I too
13 would urge you to look back at the Waste Management Case,
14 or look at my summation of the case in the staff report.

15 Material that has value to its owner and is sold
16 to somebody else or donated for value to someone else and
17 is not discarded is not solid waste for the purposes of a
18 franchise agreement. That's what that case said.

19 This material has no value to the homeowners who
20 generate it. In fact, it's a negative value since they
21 have to pay somebody to get rid of it. Mr. Fishback does
22 not pay for it. We don't know whether anybody pays him.
23 There's no evidence on that, that I'm aware of.

24 Secondly, just recall that the fact that material
25 may have a beneficial reuse does not justify its disposal

1 outside of the regulations that the Board has set up for
2 that purpose. The Board has created a series of
3 exemptions and low level permits for the proper handling
4 and disposal of inert debris. Mr. Fishback has elected
5 not to -- not to try to comply with those requirements.

6 If Mr. Fishback were to seek an exemption, based
7 on the material in the administrative record, the
8 engineering information in there is not sufficient under
9 the Board's requirements.

10 I would urge the Board not to consider this
11 material that was distributed today. This is not part of
12 the administrative record. Staff has not seen it. The
13 LEA has not seen it. We have no idea whether it's
14 engineering information or not. But in any rate, it
15 should not be considered in your decision.

16 And lastly, we would just recommend that the Board
17 uphold the decision of the hearing officer.

18 Thank you.

19 CHAIRPERSON BROWN: Thank you very much.

20 Any questions?

21 Member Mulé?

22 COMMISSIONER DANZINGER: No. Go ahead, Rosalie.

23 MEMBER MULÉ: Go ahead.

24 MEMBER DANZINGER: I just have one question. I
25 want to ask it of the appellant.

1 A lot of the later discussion -- and it was -- it
2 was embedded in some of your comments, gentlemen, on the
3 policy side, not the legal side, but a lot of it went to
4 the precedential nature of this. And you know, we've
5 heard warning shots fired from both sides on this.

6 But I want to give the appellant a chance to
7 answer a more direct question along these lines: What is
8 distinctive about this case that would not establish a
9 precedent, opening the door for unregulated disposal sites
10 operating under the guise of diversion or beneficial reuse
11 activities?

12 MR. EOWAN: I think the -- one of the things that
13 makes this case unique and maybe precedential is that he
14 is approaching this for a particular purpose, and that is
15 to improve the slopes at his -- at his property, for the
16 purpose of stopping the washout in those steep slopes, so
17 that he can continue with his vision, as he called it,
18 which I think is appropriate, that he has for that
19 property, for he and his family in the future.

20 The other -- the other dangers that were cited
21 related to people that were in the disposal business,
22 whether they are collecting tires for that purpose or
23 whatever. I mean, I don't know all those cases. But in
24 general, that's my understanding of what they were doing;
25 they were making money to do that. That's not what he's

1 doing.

2 So from the standpoint of innovative uses of this
3 material, you have the situation where he is -- has come
4 up with a way to use this material for -- for the
5 improvement of that property, and only for the improvement
6 of that property.

7 If you look at it conversely and you say, what if
8 he didn't do that? What if he didn't use that material,
9 what would he use? And he was going to outline -- I don't
10 think he had an opportunity to tell you. But what he
11 would have done is either compacted soil or new material,
12 some kind of new concrete-type of material. The effect
13 would have been the same, absolutely the same. He would
14 have -- he would have constructed the slopes in a way so
15 that they wouldn't have washed out.

16 So the precedent is that you are using this
17 material in a way that improves that. And that's it.

18 COMMISSIONER DANZINGER: What makes it distinctive
19 and what prevents the creation of the wrong precedent is
20 what you were talking about earlier, the emphasis on what
21 you do with the material is something that also must be
22 taken into account, when you are determining what is a
23 solid waste handling facility.

24 MR. EOWAN: And we grant that this is --

25 COMMISSIONER DANZINGER: -- new activity.

1 MR. EOWAN: That's right. And it is new ground,
2 so to speak. No pun intended.

3 COMMISSIONER DANZINGER: It's not reuse.

4 MR. EOWAN: But it is an area where it requires
5 expertise in interpretation of what's intended with the
6 Integrated Waste Management Act. This is your
7 responsibility. It's not creating new law to interpret
8 it, based on your position, there and at the Board. And
9 that's what we are asking you to do.

10 COMMISSIONER DANZINGER: Thanks.

11 CHAIRPERSON BROWN: Rosalie?

12 MEMBER MULÉ: Thank you. I have a question for
13 Mr. Fishback.

14 Mr. Fishback, I understand that you had gone to
15 other local agencies to find out what appropriate permits
16 you might need; is that correct? Am I correct in
17 understanding that?

18 MR. FISHBACK: That's correct.

19 MEMBER MULÉ: Okay. So -- and so you went through
20 this process, going to various agencies, trying to find
21 out what the appropriate permits you might need?

22 MR. FISHBACK: Yes. There's a -- there are
23 numerous agencies, both at the state level and the local
24 level, when you start to deal with improvements to the
25 land. There's a corps of engineers that literally go to

1 mountaintops to determine whether you have a stream; Fish
2 and Game. We've had, I think, almost every agency that
3 you can imagine, out to the property, making inspections.

4 But before they came looking to inspect the
5 property, it goes all the way back to 2002, that I
6 initially went to the Resource Conservation District,
7 which seemed to be the first appropriate party to go to.
8 I talked with them. I went to the Grading Department,
9 Building and Safety -- which I can't plead ignorance on
10 that; after 40 years in the business of architecture and
11 Building and Safety. So I know that Building and Safety
12 has nothing to do with agricultural grading, if you will.

13 I knew -- a couple of years ago, I knew virtually
14 nothing about solid waste disposal. I think, today, that
15 I may know as much as about it as most people do. And so
16 I kind of bounced back and forth between Environmental
17 Health Department and, what's called in Ventura County,
18 Environmental and Energy Resources Department, which
19 controls diversion.

20 And I was actually referred -- I found out about
21 EERD, it's called, from Environmental Health, the person
22 at the counter. And I went to EERD. I found out about
23 Ventura County MAX, it's called. You, of course, know
24 CalMAX, which is on your Web site. So what I'm doing,
25 while it may be a little bit larger scale, than people who

1 are taking a half a dozen, ten truckloads of concrete to
2 put on their driveways and that sort of thing. But people
3 are doing what I'm doing all the time, around the county,
4 basically using Ventura County MAX, and I'm sure they are
5 doing the same thing all over the state. Because there
6 is, basically, this promotion, starting at the state level
7 and moving out to the various county and city
8 jurisdictions, to try to reuse this material.

9 And in fact, as we sit here today, Ventura County,
10 I think, it possibly, because of some of my
11 encouragement -- that may be a little bit the wrong word
12 to use. But they are voting today on a new CD diversion
13 ordinance. And I think I may have shared with you a memo
14 that I had written to the board of supervisors, there,
15 that gives a little background and history of this whole
16 thing. I wish I could have been there today.

17 But starting today, assuming they pass that
18 ordinance, there is going to be tremendous pressure on
19 people to basically divert C&D material, which they have
20 never had an ordinance related to that before.

21 And so that's where I have been really stumped is
22 I've come to Sacramento, probably, on three or four
23 different occasions, trying to get direction in terms of,
24 okay, if I'm not understanding the regs properly, do I
25 need to get receipts from these contractors who deal with

1 the owners, who basically want to donate this material and
2 those sorts of things? But I was given absolutely no
3 direction, because basically it's said that you are doing
4 solid waste disposal, period. So I'm probably rambling on
5 here, and saying more than what you ever asked for.

6 MEMBER MULE: That's okay. So my follow-up
7 question is then, you went to all these agencies, asked
8 for, you know, guidance on what types of permits were
9 needed. And then is it my understanding, then, that you
10 were told that you needed engineering plans for your
11 project?

12 MR. FISHBACK: Yes. At approximately February of
13 '06 was where I had a sit-down meeting with the
14 Environmental Health Department. And they basically,
15 after that meeting -- and I explained to them that I
16 thought I was reusing material and diverting material and
17 that sort of thing -- they wrote me a letter back and
18 said, "No, you are a disposal facility, and we want to
19 come out and inspect your property." And they gave me a
20 list of things that they needed.

21 Now, prior to that, I had a civil engineer on the
22 job within a month or so of when I started this whole
23 activity, after the '05 storms. But they said -- they had
24 in one of their early visits in February, that they needed
25 some engineering information.

1 Now, I somewhat resisted that for the very reason
2 that I have heard here today, which is that, to me,
3 they've kind of reversed it. To me, those engineered-fill
4 operations, under 5.95, are under disposal regulations.
5 And so the engineering requirements of those disposal
6 regulations are there as minimum standards, not like
7 construction engineering requirements and specifications.
8 If you are doing construction, you have engineering
9 requirements too. And we have engineering -- we have had
10 engineered fill for centuries.

11 MEMBER MULE: So then that's my question, is then,
12 none of these other agencies required engineering plans
13 for the activities you were conducting?

14 MR. FISHBACK: No, because we were doing such a
15 limited amount of work. Under the Resource Conservation
16 District, there's this 10 percent exclusion in terms of
17 doing cutting and filling and grading and anything you
18 want to do, under the Resource Conservation District; that
19 we were within those limits. And so we did not need
20 technically any engineering on that. But we basically
21 were getting just a constant barrage of complaints. And
22 so we voluntarily agreed to get the HECO plan formalized.
23 And so that's what we did.

24 MEMBER MULE: And then the HECO plan includes
25 engineering plans as part of that plan?

1 MR. FISHBACK: Yes. Yes. I think that's a part
2 of record. Is the HECO --

3 MEMBER MULÉ: Yeah, we've gone through it. I
4 just -- I don't know that I recall seeing a set of
5 engineering plans, per se.

6 MR. FISHBACK: Yes. There's a grading plan in
7 there. It's in a little folder pocket.

8 MEMBER MULÉ: Okay. Thank you.

9 CHAIRPERSON BROWN: I just have a quick question:
10 Mr. Fishback, in your response, it's Volume 3, Page 173, I
11 just am curious. On your logs that you provided to the
12 LEA, I believe, in almost every entry, you discuss fines
13 for material, that is coming on to your property, that is
14 not appropriate, rebar and such; and that you are
15 discarding it once it comes on your property and you have
16 called to warn people of future fines if they continue to
17 bring that type of property.

18 How -- I mean, are you fining these people? Are
19 you receiving money to get this material when they bring
20 it back? Do you have any -- I mean, I'm wondering how you
21 actually fine people if you are not taking money, to take
22 material. And if they are continuing to bring it -- I
23 mean, there are repeated instances where you have noted
24 that material has been taken to your property that is not
25 appropriate rebar and whatever, that you can not use --

1 asphalt.

2 MR. FISHBACK: Yes.

3 I don't quite connect the two. I don't receive any
4 money for the material that's brought in. But I had -- it
5 was actually, I think, a couple of different haulers that
6 I had a few repeated incidents, that there was some
7 material in there, rebar, and that sort of thing, that we
8 found. And so I found the best way to get this stopped
9 was to just simply tell them, "You are going to be charged
10 a fine if you are coming in here with any inappropriate
11 materials."

12 The material was supposed to be sorted at the
13 construction site, from where it was coming. And in 99 --
14 probably -- .9 percent of the cases, I think, the material
15 was clean concrete, brick. In fact, probably for every
16 square yard of material was dug up, I'm sure that it would
17 be probably 99 percent concrete. That's really the
18 material that's in there. There's very little -- there's
19 a little bit of tile. There's a little bit of brick.
20 There might be some concrete blocks. Of course, concrete
21 block is concrete. Stucco is a concrete product. So it's
22 virtually all concrete in the fill.

23 But there -- but there were some contractors that
24 got some material in there that was not appropriate. And
25 so I just said, "You're either going to stop" -- in fact,

1 there were a couple of truckers that we just would not
2 allow to come any more, because they brought in some
3 material that was not good.

4 CHAIRPERSON BROWN: Okay. I guess my question --
5 I just roughly -- I'm not going to go percentages-wise. I
6 went through every one of the entries that you provided to
7 Mr. Stratton.

8 MR. FISHBACK: Yeah.

9 CHAIRPERSON BROWN: And 99 percent is not an
10 accurate representation of the number of trucks that
11 brought inappropriate material on the property.

12 If you look, starting at Page 175, for instance, I
13 think almost 99 percent of the entries following that
14 stipulate that rebar or asphalt was brought onto your
15 property and you received it. And you warned them of a
16 future fine if they continued to bring it. And then you
17 disposed of it on your property.

18 And I'm just curious, did you fine these people?
19 Because it seems like the entries continue to run. Are
20 you fining these people? And are you then receiving
21 funds? Did you fine any of the truckers, is, I guess, my
22 direct question.

23 MR. FISHBACK: Yes, I fined these truckers. But
24 I'm not quite following your 99 percent calculation.

25 CHAIRPERSON BROWN: I'm not going on exact

1 numbers. I'm just saying, once I started looking at this,
2 on Page 77, there's the first, the second, and the third
3 entry.

4 On Page 78, there's the first, the second, and the
5 third entry.

6 On Page 79, there's the first, the second, and the
7 third entry, all of which.

8 And then on Page 80, you have another two that you
9 removed rebar and you removed material that should not
10 have been brought on your property, for your use, for
11 engineered fill. And you warned of fines.

12 My question was: Did you fine these people? And
13 you said yes.

14 MR. FISHBACK: Yes.

15 CHAIRPERSON BROWN: So you are taking money for
16 receiving this material on your property?

17 MR. FISHBACK: I guess if you consider the fine, a
18 fine.

19 CHAIRPERSON BROWN: Okay. Thank you.

20 MR. FISHBACK: No, I did not dispose of this stuff
21 on my property.

22 CHAIRPERSON BROWN: It was put in a dumpster.

23 MR. FISHBACK: Yes.

24 CHAIRPERSON BROWN: For pickup?

25 MR. FISHBACK: Yes.

1 CHAIRPERSON BROWN: Okay. I understand that part
2 of it.

3 MR. FISHBACK: Okay.

4 CHAIRPERSON BROWN: Any other questions?

5 Okay. I believe I'm going to make a grand
6 decision at this time that we will go into closed session,
7 which we need to deliberate in a public meeting noticed
8 closed session, so we will do that today. But we will
9 issue our decision, in writing, via an e-mail to each of
10 the parties, and posted on the Internet, by the end of
11 this week.

12 Is that okay? It's Tuesday.

13 If it's going to be delayed beyond the conclusion
14 of this week and close of business of Friday, we will
15 notify each of the parties that we need more time for
16 deliberations and an additional closed session for
17 contemplation, which the Board will meet in open session
18 next Wednesday. So if a decision cannot be made today and
19 a determination, then we will continue in closed session
20 next Tuesday, without continuing discussion. But we will
21 continue deliberation in a closed session after
22 Wednesday's open meeting.

23 So we will notify you if it's going to be beyond
24 Friday. Thank you very much. Thank you all for your
25 participation, for being here, and Happy New Year.

1 MS. NEISWENDER: Thank you for your time.
2 (The Board recessed into closed session.)
3 (The CIWMB special board meeting concluded
4 at 5:00 p.m.)
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1 CERTIFICATE OF REPORTER

2 I, KATHRYN S. KENYON, a Certified Shorthand Reporter
3 of the State of California, do hereby certify:

4 That I am a disinterested person herein; that the
5 foregoing California Integrated Waste Management Board
6 Special Board Meeting, in the Matter of Wayne Fishback,
7 Appellant, vs. Ventura County Environmental Health
8 Division, Local Enforcement Agency, Respondent, was
9 reported in shorthand by me, Kathryn S. Kenyon, a
10 Certified Shorthand Reporter of the State of California,
11 and thereafter transcribed into typewriting.

12 I further certify that I am not of counsel or
13 attorney for any of the parties to said meeting nor in any
14 way interested in the outcome of said meeting.

15 IN WITNESS WHEREOF, I have hereunto set my hand this
16 22nd of January, 2007.

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23 KATHRYN S. KENYON, CSR

24 Certified Shorthand Reporter

25 License No. 13061

Please note: These transcripts are not individually reviewed and approved for accuracy.